THE
CLASSICS OF INTERNATIONAL LAW

EDITED BY

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De Jure et Officiis Bellicis et Disciplina Militari Libri III

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VOL. I. Reproduction of the First Edition, with Introduction by John Westlake.

VOL. II. Translation of the Text, by John Pawley Bate, with Translator's Note and Index of Citations.

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Non in multitudine exercitus victoria belli; sed de cælo fortitudo est. 1. Mach. 3.



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Three Books

On the Law of War
And on the Duties Connected with War
And on Military Discipline

BY

BALTHAZAR AYALA

Jurisconsult and Judge Advocate General of the Royal Army in the Low Countries

"For the victory of battle standeth not in
the multitude of an host; but strength
cometh from heaven." 1 Mach. 3

Douay, from the business-house of John Bogardus, licensed printer,
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VOLUME TWO

THE TRANSLATION

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Volume I.

The text here reproduced was photographed from a copy of the original edition of 1582, belonging to the library at All Souls College, Oxford, and loaned to the University Press for the purpose of photographing.

The portrait of Ayala given in this volume has been reproduced by photography from one found in a volume of portraits of Belgian authors, published at Antwerp in 1608, with the title *Illustrium Galliae Belgicae Scriptorum Icones et Elogia: ex Musaeo Auberti Mirae Canonici Antwerp.*

Volume II.

TRANSLATOR'S NOTE.

CORRECTIONS OF THE TEXT.

For the purposes of the translation the following corrections of the text as reproduced photographically in Vol. I have been adopted:

Page

13, l. 3 from bottom, *read* sine. .sine *for* siue. .siue.
52*a*, l. 15, *dele* ab.
53*a*, l. 7, *read* debitori *for* creditori.
65*a*, l. 7, *read* inultum *for* multum.
65*a*, l. 11, *read* fastigio *for* flagitio.
71, l. 9, *read* induciis *for* iudiciis.
98*a*, ll. 14, 15, *read* veritatem *for* a veritate.
98*a*, l. 15, *read* nimis *for* ius.
98*a*, l. 17, *read* sine *for* siue.
109, l. 12, *read* mihi *for* tibi.
131, l. 14, *insert* iniusta *before* pœna.
133*a*, ll. 19 and last, *read* Lavinii *for* Lanuvini.
136*a*, l. 2 from bottom, *insert* non *before* concedentibus.
144, l. 12, *insert* plena *before* ciuium.
146*a*, l. 20, *read* exanimarentur *for* examinarentur.

Page

150*a*, l. 15, *read* ager *for* agger.
151, l. 6 from bottom, *read* præbituri *for* perituri.
184*a*, l. 8, *read* Macer *for* Marcianus.
187, l. 30, *read* Marcus *for* Decius.
194*a*, l. 10, *read* duces *for* duce.
210, l. 7 from bottom, *read* Luceriam *for* lucernam.
211, l. 3 from bottom, *read* dedecore *for* decore.
215*a*, l. 8 from bottom, *read* Tauromenianam *for* Tauritanam.
218*a*, l. 9, *read* Schodram *for* Schoram.
226, l. 11 from bottom, *read* pares *for* partes.
[Note also, p. 4, l. 9, the usual reading is *oratores,* not *oratorum.* And, query, p. 146, l. 4, read *coortos* for *cohortes?*]

ERRORS IN THE MARGINAL REFERENCES.

These are not uncommon, and the second edition—which was published at Antwerp in 1597, therefore after Ayala's death—gives very little help in detecting them. The most usual error is in a number, say of a Book of Livy or of a *Causa* in the Decretum: sometimes a passage is assigned by mistake to the Digest instead of to the Code: sometimes a small but disconcerting slip is made in the name of a Title in the Digest or the Code (thus *de non fœn.* is given for *de nautico fœn.*).

It is not proposed to give a list of such errors as have been found: instead, the translator has corrected them in the margin of the translation. In the few cases where he remains baffled (whether by an error or by an obscurity) he has printed the reference as it stands in the original (see, e. g., note *a*, p. 100*a*, vol. 1, and note *a*, p. 219, vol. 1).

MODE OF CITATION OF BIBLE, AND OF THE BOOKS OF THE CIVIL, CANON, FEUDAL, AND IMPERIAL LAWS.

(1) The names of books in the Bible are given as in the English "Authorised Version": thus, where Ayala cites 1 or 3 Kings (*Regum*), the translation cites 1 Sam. and 1 Kings respectively.

(2) Passages in the law-books of Justinian, or the Canon Law, or the Feudal or Imperial Law, are cited (wherever possible) by *number* of Book, Title and Section, and not (as in Ayala) by the name or opening words thereof: the former method is not only the method employed in the United States and Great Britain, but is also shorter than the latter method.*

The references which Ayala makes to the Authenticæ are of two kinds. In the one case they are to passages in the Novels: these are given in the margin of the translation by the number of the Novel. In the other case the reference is to one of those summaries of an Imperial Constitution, or Novel, which used to be appended, in manuscript and early printed editions, to the part of the Code affected by the Novel in question, but which are omitted, as being unofficial, in modern editions. In the margin of the translation the reference to the Code is given, for use with one of the earlier editions mentioned, and the number of the passage in the Novel which is summarised is added, for use with a more modern edition. [In note *a*, p. 31*a*, vol. 1, is an instance of each of these kinds of reference.]

(3) More particularly, as to the citations from the Canon and the later Imperial Law:

A reference made by Distinctio and Caput (thus, c. 8, Dist. 35) is to the first part of the Decretum: references to the second part of the Decretum give, first, the Caput (c.), then the Causa (C.) and lastly the quæstio (thus, c. 29, C. 17, qu. 4): the third part of the Decretum is indicated by the words De Consecratione (thus, the only reference to this part—see p. 131—is as follows, c. 26, Dist. 5, de consecr.).

The Decretals of Pope Gregory IX are indicated by the letter X (for Extra Decretum): thus, c. 7, X. 5. 27 means caput 7 in Bk. 5, Tit. 27 of the Decretals of Pope Gregory IX. In order to distinguish the references to the Liber Sextus of the Decretals, "in vi" (that is, *in sexto*) is used: thus, c. 1, Bk. 5, Tit. 1 in vi means caput 1 of Bk. 5, Tit. 1 in "Liber Sextus." References to that subdivision of the second part of the Canon Law which is called Liber Clementinarum are given in the following form: c. 2, in Clem. ii. 11. This stands for caput 2 of Book ii, Tit. 11, in Clementinis.

Ayala uses the abbreviation $\overline{\text{ex}}$ in three distinct senses, first, to indicate any part of the Canon Law outside the Decretum, i. e., extra Decretum (see p. 61, vol. 1, note *e*, where the reference is to the Decretals)—these cases are among those dealt with in the preceding paragraph; sec-

* The following illustrations (from vol. ii, p. 12) will show how subdivisions of a Title are cited. "Dig. 49, 15, 19, 2" means Digest, Bk. 49, Tit. 15, Lex 19, section 2. "Dig. 39, 5:2 (7) and 3" means Digest, Bk. 39, Tit. 5, Lex 2, section 7, and Lex 3. Citations in the same note from different Books of the Digest are separated by a semi-colon. "pr."—see *e. g.* p. 22—stands for *principium* and indicates the opening section of a Lex.

The references to the Institutes, Digest, and Code are given as in Mommsen's edition; he references to the Novels as in the edition of Schoell and Kroll.

In the case of the Feudal Law the references are to the edition of Gothofredus.

ond, to indicate Papal Extravagantes (see p. 18*a*, note *c*, where the reference is to the Extravagantes communes); and third, to indicate Imperial Extravagantes (see p. 8, note *g*, where the reference is to a constitution of the Emperor Hen. VII). In the latter two of these cases, that is, where the reference is to the Extravagantes, Papal or Imperial, the abbreviation Extrav. is used in the margin of the translation.

CLASSIFIED LIST OF AUTHORITIES CITED.

In addition to the works just named Ayala cites the poets Ovid, Vergil, Horace, Propertius, Lucan and Ennius.

Also the following historians, philosophers or grammarians: Aristotle, Plato, Æschines, Euripides, Demosthenes, Cæsar, Livy, Cato, Cicero, Dionysius of Halicarnassus, Cinna, Sallust, Tacitus, Xenophon, Plutarch, Suetonius, Cornificius, Appian, Valerius Maximus, Florus, Quintilian, Quintus Curtius, Aulus Gellius, Pliny the elder, Pliny the younger, Ælius Lampridius, Polybius, Dio Cassius, Diodorus Siculus and Nonius Marcellus.

Also, Christian Fathers and later historians: St. Cyprian, St. Ambrose, St. Augustine, Lactantius, Sozomen, Cassiodorus, Orosius, Eusebius and Procopius.

Of writers nearer his own time Ayala cites: Thomas Aquinas, Ferrandus Diaconus, Nicephorus, Froissart, Alexander ab Alexandro, Ant. de Herrera y Tordesillas, Petr. Crinitus, Ludov. Coelius Rhodiginus, Alfonso of Castile, Hotman, Bernard de Girard, Bodin, Egnatius (Egnazio), Hieron. Gratianus (Grazio) and Petrinus Bellus. Also from books on Numismatics by Covarruvias and Hadr. Jun. Hornanus. And from the Royal Ordinances of Spain and from Decisions of Church Councils. And also the jurists or canonists in the following list *:

Abbas, see Panormitanus.
Accurtius, 13th Cent., of Florence.
de Adflictis, Matth., 15th-16th Cent., Naples
Albertus Brixensis (of Brescia), 14th Cent.
Alciatus, 16th Cent., Milan.
Alexander, see Tartagnus.
Alvarus: Pelagius, 14th Cent., Span.
de Anania, Joh., 15th Cent., Bologna.
de Ancharano, Petr., 14th-15th Cent., Bologna.
Andreae, Joh., 14th Cent., Florence.
Angelus, or Aretinus (of Arezzo), 15th Cent.
Baldus de Ubaldis, Perusia, 14th Cent.
Bartolus of Sasso Ferrato, 14th Cent.
de Bellapertica or Belleperche, Petr., 13th-14th Cent., Burgundy.
Bellovensis (of Beauvais), Vincent, 13th Cent. (cited as Vinc.).
Boerius (Boyer), 16th Cent., France.
†Bonaud de Sauset, Jac., 15th-16th Cent., France.
Brixensis, see Albertus.
Budæus (Budé), Gul., 15th-16th Cent., France.
de Butrio, Ant., 14th Cent., Bologna.
Cagnolus, Hieron., 16th Cent., Padua.
‡ de Canibus, Joh. Jac., 15th Cent., Padua.

* In several of these cases Ayala does not directly cite the writer, but merely names him, on the authority of some other named writer, as holding the opinion in question.

† "Borrandus" in margin p. 100*a* is a misprint: Bonaud is meant.

‡ "Camb." in margin p. 31*a* is a misprint for Canib.

Cantiuncula, Claude, 16th Cent., Alsace.
Card. is abbreviation for Cardinal a Turre Cremata (i. e., Torquemada), 15th Cent., Span.
de Castro, Paulus, 15th Cent., Naples.
Chassaneo, Bartol., 16th Cent., France, cited as Chas. (?) and as Cas.
Cinus, or Cynus, 14th Cent., Pistoia.
Clarus, Julius, 16th Cent., Milan.
Connanus,* Francisc., 16th Cent., France.
Corasius (de Coras), 16th Cent., Toulouse.
Corneus, Pet. Phil., 15th Cent., Perugia.
Corsetti (or Corsecti), Ant., 15th-16th Cent., Sicily, etc.
de Covarruvias, 16th Cent., Span.
de Crema, Francisc., 15th Cent.
de Cuneo, or de Cugno, Gul., 16th Cent.
Curtius or Corte (Senior †), 15th Cent., Pavia.
Curtius or Corte (Junior †), Francisc., 15th-16th Cent., Pavia.
Curtius or Corte, Rochus, 15th-16th Cent., Pavia.
Decius, Philip, 15th-16th Cent., Pavia.
Domin., see de Soto.
Duarenus (François le Douaren), 16th Cent., France.
Durandus, Gul., 13th Cent., France: cited by nickname of Speculator.
Faber, Joannes, 16th Cent., Mechlin.
Felinus, or Sandei of Felino near Reggio, 15th Cent.
Fortunatus, Marcel., 16th Cent., Ital.
Franc, see Victoria.
Fulgosius (Fregoso), 15th Cent., Piacenza.
de Imola, Joh., 15th Cent., Bologna.
Jason, Mainus., 15th Cent., Ital.
Laudensis (of Lodi), Mart., 14th Cent., Ital.
Molinæus (Dumoulin), Chas., 16th Cent., Paris.
Mynsinger a Frundeck, Joach., 16th Cent., Stuttgart.
Natta, of Asti, 15th Cent., Ital.
Oldradus de Ponte, 14th Cent., Ital.
Omphalius, Jacob, 16th Cent., Cologne.
Panormitanus (of Palermo), Nich. de Tedeschis, 16th Cent. Also cited as Abbas.
Papae, or de la Pape, Guido, 15th Cent., France.
Paponius, Joh. (or Papon), 16th Cent., France.
Præpositi (or Desparborde), Gul., 14th Cent., Span.
Pyrrhus Englebermæus, 16th Cent., Orleans.
de Rauen (Ravanus), 13th Cent., Lorraine.
Ripa, Joh. Francesc., 16th Cent., Pavia.
Romanus, Ludovic., 15th Cent., Ital.
de Rosate (of Roxiati, near Bergamo), Albericus, 14th Cent.
Salicetus, either Rich., 14th Cent., or Bartol., 14th-15th Cent., both of Bologna.
de Silvestris, Vergilius, 16th Cent., Ital.
Socinus, Bartol., 15th Cent., Siena, son of the elder Marian. Soc.
Socinus, Laelius Francisc. Maria, 16th Cent., Siena, nephew of preceding.
de Soto, Dominicus, 16th Cent., Spain: sometimes cited as Domin.
Speculator, see Durandus.
Tartagnus (de Tartagnis), Alexander, 15th Cent., Ital.
Tiraquellus (Tiraqueau), 16th Cent., France.
de Valle (or a Val.), Roland, 16th Cent., Ital.
Vasquius (Vasquez), Fernandus, 16th Cent., Span.
Verrutius, Hieron., 16th Cent., Groningen.
de Victoria, Francisc., 16th Cent., Span.
Vinc., see Bellovensis.
Zasius, 16th Cent., Freiburg in Breisgau.
Zoannettus, Francisc., 16th Cent., Bologna.

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*Cited in original, p. 75a, as Conan.
†Curt. Inn. is sometimes misprinted for Curt. jun. and Curt. Sent. for Curt. sen.

To the most serene Prince of Parma and Piacenza,
Alexander Farnese,
Lieutenant-Governor and most successful Captain-general for the King in the Low Countries,

Balthazar Ayala, jurisconsult, greeting:

Publicists maintain, Most Serene Prince, that the habit of referring our actions and laws and legislation to the standards of our forefathers and of their institutions conduces very materially to the welfare and preservation of the State; for it is with the State as it is with some celebrated picture which is fading with age, if we omit to renew its original coloring it will keep neither beauty nor outline; and just as in the human body so, too, in the State, every day there is something developed which calls for treatment; and outworn laws breed vices such as the State can not tolerate for any length of time. Hence Ennius' line:

> *Moribus antiquis res stat Romana, virisque.*
> (On old custom the fortunes of Rome are based and on her manhood.)

a line which in its terseness and truth Cicero thought worthy of the oracle. For (says he) had not the State been stayed as it was by customary rules, its men would not have availed to found or perpetuate so vast and beneficent an empire, nor would these customary rules have sufficed had not men of such a type been at the head of the State. In his book on The Republic.

Ancestral observance of custom, then, begat fine men and they in their turn were tenacious of the customs and customary institutions which had descended to them from their fathers. This is the reason why the Roman State grew and endured. For (as Sallust says) empire is easily preserved by the same means by which it was at the outset gained, but, if sloth usurp the place of industry, if lust and pride usurp the place of self-restraint and fair-dealing, then a change of fortune at once accompanies this change of character.

It was this that Apollo is taken to have meant by his reply on the occasion of his being asked to say when, at last, the end would come of the ills and dissensions by which Greece was so sorely troubled. The oracle's reply was that the troubles of Greece would end when the Greeks had doubled the god's altar at Delos. Now this altar was cubical in form; so the Greeks thought they could easily fulfil the condition, by adding a second mass equal in bulk to the existing one. They did not, however, obtain thereby any diminution of their ills and the same god gave them to understand that the condition imposed by the oracle had not been duly satisfied.

At last, under the teaching of Plato and other philosophers, they came to understand that what the oracle of Apollo had required was not the matching of a new bulk with an old one, but the adoption of such new measures and principles as were conformable to the old ones (*analogiam cum analogia et rationem cum ratione componendam*); and thus when, owing to the far-seeing counsel of men of wisdom, matters had been adjusted to the standards of olden times and harmonized with the institutions of their forebears, and everything was put back into its proper place, the evil began to abate and the well-being of days of yore began to return.

Odes, bk. 3, ode 6. The same sentiment inspired Horace, when he perceived what disasters the neglect of religious observance had brought in its train, to address to the Romans the lines,

> Delicta maiorum immeritus lues,
> Romane, donec templa refeceris,
> Aedeisque labenteis deorum et
> Fœda nigro simulacra fumo.
>
> (O Roman, you, though guiltless, will expiate the offenses of your forefathers, until you have repaired the temples and falling shrines of the gods and the statues sullied with blackening smoke.)

In these lines Horace shows how far the Romans had fallen below their ancestors through violating religious duty and neglecting the ancient rule. And we have a notable instance of this
Bk. 6. in Roman history, clearly set out by Livy, where he tells us how corruption of Roman morals, neglect of divine worship, and violation of the law of nations were followed by the capture and

almost total destruction of the city by the Gauls. The valor of Camillus, however, restored to the city its liberty, and this was followed by the restoration of divine worship, by the revival of ancestral laws and institutions, and by the punishment of those who had violated the law of nations; the result was that the city throve wondrously, gaining in time the empire of the whole earth, and there was truth in the epigram that the city of Rome would long ago have been on the edge of ruin if it had not been ruined; at any rate it would never have reached such an eminence.

It is our hope, Most Serene Prince, that in similar fashion your surpassing valor and wonderful skill and foresight in affairs may lead to the restoration of the worship of the true God and to the reestablishment of the sovereign authority of the king (due to him both by divine and human law), and that so the subversion of all things human and divine which has been brought into the Low Countries may by God's aid be checked and at last ended, and that the whole of the Low Countries may be restored to their former happy state. Of which country may be said what our sacred books say of the Israelites: Judith, ch. 5.

"Whatsoever place they went up against, their God fought for them, without their bow and arrow and without their shield and sword, and he conquered: nor was there any to mock at that people save when they forsook the worship of the Lord their God. But as often as they worshipped any other god than Him, they were given for a spoil and to the sword and to reproach."

Further, the expediency of frequently revising the laws and enactments of ordinary civil society and of shaping them to the model of old institutions is admitted; and this led the early Romans to appoint censors whose duty was to scrutinize the morals of the citizens (liable, as they are, so easily to become corrupt if neglected) and in that way to preserve the old-time seemliness and uprightness of behavior. But in war, assuredly, this process is especially fitting, seeing that military discipline requires a rough and sharp kind of punishment. For, as Valerius Maximus observes, armed forces are the repository of strength and if these be once put on the wrong path, they will crush unless they are

crushed. So much, indeed, depends on military discipline that merely according as it is maintained or neglected, so have decisive defeats been inflicted or sustained, many armies been overwhelmed or preserved, vast empires (in a word) been gained or ruined, as we shall show at greater length in the course of this book.

Now the Romans (who claimed Mars as ancestor both for themselves and for their founder) reached the height of their military glory entirely by dint of military discipline—which Valerius Maximus calls the especial adornment and buttress of the Roman Empire; but when this discipline slackened they were gradually involved in more and more disasters until the day came when they had lost, together with the valor of their ancestors, both empire and glory. Accordingly I have thought it a work worth doing, so far as my legal studies and historical reading enabled me, to describe how so great military glory was earned, as regards the men and methods employed and the kind of discipline resorted to. The result will show that men's qualities are the same now as formerly and that the chances and occurrences which befall us from day to day are the same as befell men formerly; so that it will not be difficult for one who ponders with diligence on things of old and examines them with judicial deliberation to employ the past—appropriate task for a wise man—in judging the present, in foretelling the future, and in educing from old examples remedies fit (because of the similarity of the circumstances) for modern ills.

These are matters the neglect of which more often than not may cause us to stumble over the same stone. For (as Aristides used to say) big things are achieved in war not so much by arms as by prudence and planning. Accordingly, Xerxes, whose forces earth and sea could scarce contain, was beaten by the assiduity of a single individual, Themistocles. The Romans, too, did not possess greater or stronger forces than did the vast kingdoms and savage barbarians encountered by them, but the sternness of their moral usages and their military system gave them the upper hand. It was for this reason that Agamemnon did not desire to have ten men like Ajax, but like Nestor and Ulysses,

never doubting that their counsel and prudence would bring about the speedy overthrow of Troy. And Sallust tells us how there was a long-standing controversy as to whether bodily strength or mental qualities contributed the more to military success, but later, in times of danger and difficulty, it was realized that powers of mind were the most effective in war. In Cicero, Acad. quest., bk. 2. indeed, we read that when Lucullus started from Rome for the Mithridatic war he was admittedly ignorant of military matters, but by reading about campaigns, and by his industry and native wit, he became so proficient a commander, in every species of warfare, that Mithridates, the greatest king after Alexander, declared that in his judgment Lucullus was to be ranked above all the generals whom he had read about.

It was, therefore, a sage reply that Alfonso, King of Aragon, made to the question whether he owed more to arms or to books: he said that he had learned from books both arms and the laws of arms, thus proclaiming to the world that he owed everything to learning. And the remark of the Emperor Justinian tends in the Constit. confirming the Code, Sec. 1. same direction, namely, that on the one hand military affairs have been carried through in safety by means of law and that on the other hand law has been preserved under the protection of arms, each always requiring the help of the other. In short, it is incontrovertible that no State, however flourishing, can find any degree of safety in arms without law and discipline any more than in law without arms.

And so, Most Serene Prince, I feel assured that this work of mine, such as it is, will not be displeasing to your Highness. The offering is, of a truth, a poor one and unworthy of your splendor, but (unless I err) it is opportune to the present crisis; and I would that, in appraising my work, my perhaps overexacting and severe critics may bear in mind what Quintus Fabius Maximus said to his son, Quintus Fabius Maximus the consul, namely, that the same standard ought not to be applied in the midst of the heat of war as in the tranquillity of peace, for much that in quiet times is visited with correction and punishment is pardonable in times of mobs and the sword.

Most Serene Prince, I have dedicated to your Highness whatever study and toil there is here, both because I desired, in

my own interests, that your Highness should have the means of knowing how and with what studies I have occupied the leisure left me by my public duties, and also because I thought that no one would be more interested in these military topics than a general so great and an enthusiast for military discipline so keen as yourself.

May God, most good and most mighty, guide your movements and preserve you to us to the most distant day.

From the camp before Tournai, 31 Oct. 1581.

A PREFACE CONCERNING THE LAW OF WAR.

It is commonly thought a fine saying of Pindar that war is a tyrant and a mistress, lording it over all law, there being nothing so opposed to God's gift of law as force, which is a characteristic of the beasts. Just as the eagle is endowed with sharpness of talon and the lion with savagery of tooth, so man with reason (which jurists correctly style the soul of law); and this should be his only weapon and defense. Now, although a State can not be carried on without justice and although nothing is so subversive of the State as injustice (as was decisively shown by Lælius in the dialogue which Cicero, in his *Republic,* represents him as holding with Philo), yet it is to-day a fixed idea with many that war can not be waged without violation of right, for the ills that inevitably spring from wars, even from those that are classed as just, are so many and great and fearful and cruel that any one who would propose to apply to all of them the test of justice is simply blending reason with raving. For, it was on the propositions that in war there is no scope at all for justice and that that is right in war which is expedient to the stronger (might supplanting right), that men of old used especially to rely in order to prove that it was unjust and contrary to nature for men to be enslaved by their conquerors, this being an institution derived from the law of war—while they admitted, however, that this was a kind of injustice which every far-spreading empire must adopt as essential to the administration of its provinces.

The opinion in question must, however, be unhesitatingly repudiated. There are laws of war just as much as of peace. The use of force against those who will not submit to fair demands or will not be restrained by reason is not an injustice. For (as St. Augustine says) the wickedness of the enemy convinces the wise man that the prosecution of "just" wars is not only right but also a necessity. Accordingly, David, a man after God's own heart, and other very holy men have made war; and God himself ordered the Jews to make war on the Amorites and other peoples.

On the Kingdom of God, bk. 19, ch. 7.

c. 3, C. 23, qu. 1.

A wise man, therefore, will grieve to have to admit that the necessity for a just war has arisen, but he will embark on it, plac-

Deut. 2.

ing the common weal before the interests of individuals lest, unmindful of the well-known dictum of Plato, he should abandon the body of the State as a whole through his wish to protect some given part thereof. Nor is it without more to be assumed unjust that the conquered in a just war should formerly have been taken into slavery. Nay, the justice of this can be defended on the ground of the expediency to the State of punishing those who wage unjust war; and it may also be urged that slavery is a blessing to such wrong-doers, for the opportunity of further wrongdoing is taken away from them and they will behave better under restraint than as their own masters. Agesilaus was wont to characterize the Asiatics as follows: "Good in slavery, bad in freedom."

Plutarch's Apophthegms.

And as a support to this reasoning, Lælius, in the course of the argument in Cicero's *Republic,* furnished the following noble analogy, taken as it were from nature: "Why, then, does God govern man, the soul govern the body, reason govern the passions and the other vicious parts of the soul?" St. Augustine was particularly struck with this. Moses, too, in obedience to the command of God, after the defeat of the Midianites, divided all the spoil, both man and beast, among his own men. And the Apostle admonishes slaves to be obedient to their masters and to serve them in singleness of heart. Right reason, therefore, implanted by nature in wise men, has inculcated this, that human depravity may be restrained by war, by captivity, and by slavery—on which topic we shall enlarge elsewhere.

Kingdom of God, bk. 19, ch. 7.

Numb. 31.

Ephes., ch. 6.

Further, the same principle of justice which lays down rules of war, imposes its laws on soldiers and armies, whereby military discipline is secured: * "If this be once impaired" [I borrow the words of the dictator Papirius as recorded by Livy] "neither the soldier would obey the centurion's commandment nor the centurion the tribune's, nor the tribune the legate's, nor the legate the consul's, nor the master of the horse the dictator's, while no edicts of the commander would be observed; but without leave the soldiers would wander and rogue, either in their own or on enemy's land, unmindful of their oath, and discharge themselves from soldiery through a licentious liberty of their own, whenso-

Bk. 8.

* Here and in other speeches taken from Livy, the translation by Philemon Holland (London A. D. 1600) has been followed, with some modifications. [Tr.]

ever they listed, leaving their ensigns and colors not attended, not meeting at summons; nor making any difference whether they skirmish by day or night, on even ground or uneven, with vantage or disadvantage, with direction of captain or without; observing no signals or watchword, no array. In sum, the whole course of military service would henceforth be blind, rash, and inconsiderate, after the guise of robbing, to stand and go current for solemn and sacred warfare."

For just as in string-music and in part-singing different sounds and unlike notes are blended into an accordant harmony, so it may be said of an army (as Scipio in the discussion in Cicero's *Republic* was made to say of the State) that its concerted activities are produced by the coöperation of the most unlike individuals, it being compacted into one by means of reason and discipline out of the intermingled ranks of upper, middle, and lower. And what musicians style harmony in the case of song is in the case of an army concord, that closest and most efficient bond of military discipline. Now this can not exist apart from justice, which is needed for every undertaking and which possesses such power that (in Cicero's words) not even those who batten on wrongdoing and crime can live without some spark of it.

Let this suffice to explain the motive of this work and to placate those who have ventured to condemn the laws of war (with which the safety of the State is implicated) as being contrary to nature and the peace of the Gospel.

TITLES OF CHAPTERS.

These three books are of use in the preservation of military discipline in these troublous times, and contain nothing contrary to the Catholic Faith. So I adjudge 16th Nov. 1581.

MATHIAS LAMBRECHT,
Licentiate in Sacred Theology and Regius Professor of Divinity in the good University of Douai.

THE FIRST BOOK

Of the Law and the Duties connected with War and on Military Discipline

Chapter I.

Of the method of declaring war and of other ceremonies relating to war, which anciently were regulated by fecial law.

1. Fecial law.
2. The college of fecials.
3. The duty of fecials.
4. Clarigatio (solemn demand of redress).
5. Pater patratus (the chief of the fecials).
6. The good-faith of the Tibarenians.
7. The words of the fecial law.
8. A treaty can not be made without ordinance by the people.
9. The surrender of Spurius Postumius to the enemy.
10. The formula of surrender.
11. The surrender of Mancinus to the Numantines.

How scrupulously the Romans considered what legal principles were applicable to each occasion, whether of peace or of war, may be learned from their historians; and it ought not to excite surprise that they were uniformly so successful in their wars, seeing that they never took up arms save on just grounds. Dionysius of Halicarnassus gives us Rom. Antiq., bk. 2. the following illustration of the extent to which they carried this principle.

The Campanians, in consequence of an utter defeat by the Samnites, had been compelled to beg help from Rome, and their envoys were introduced into the Senate and made long speeches, setting out the utility to the Romans of an alliance with the Campanians and craving a lasting friendship and present assistance. They did not, however, obtain more by this (owing to the Senate's unwillingness to be involved in the wars of other States) than an offer to despatch a Roman mission to the Samnites to beg that no violence should be done to the Campanians. To this offer the head of the Campanian delegation replied, in accordance with his instructions:

"Even if you decline to intervene with lawful force for our protection against force and outrage, you will certainly defend what is your own. Accordingly, we hereby surrender into your sovereignty, O Conscript Fathers, and into that of the Roman people, the Campanian people, the town of Capua, our territory, and all our interests, both divine and human; so, whatever sufferings are inflicted upon us in the future will be inflicted on your subjects."

Thereupon, so Livy narrates, the Senate, deeming it a matter of Bk. 7. honor not to abandon vassals, entered on a war with the Samnites and drew hostilities away from the Campanians and upon themselves—which they would never have done without good cause.

In like manner, before the third and last Punic War, that great undertaking was the subject of a long and detailed discussion, in the course of which widely different opinions were expressed by Marcus Porcius Cato and Scipio Nasica, leading men in the Senate, the former being reckoned the shrewdest man in the State and the latter having been adjudged, even by the Senate, the best of men. Cato urged a declaration of war against Carthage on the ground that she was keeping an army in readiness on her territory, ostensibly against King Massanissa, but in reality against Rome; Nasica took the opposite view and favored the despatch of a mission to Carthage which, while rebuking the Senate there for keeping on foot an army and naval stores in defiance of the treaty, might spy out what was being done. But Gisco, the son of Hamilcar and an obstreperous person, so worked on the Carthaginian Senate, by his advocacy of a war against Rome, that the envoys were fain to seek safety in flight. And, although Cato then protested against any further postponement of war, Nasica repeated that he could not yet find a just cause of war and that no rash steps should be taken. Cato's view, however, Flor., bk. 49. prevailed and war was begun with the Carthaginians on the ground of their maintaining a fleet in defiance of the treaty and of their having marched an army beyond their frontiers, and of their attack on Massanissa, an ally of Rome.

[1] Now the preconditions of a just war were most scrupulously Offic., bk. 1. laid down by the fecial law of Rome, as Cicero tells; and, in accordance therewith, no war can be just unless preceded by a demand of satisfaction, and by due announcement and declaration.

[2] And Ancus Martius, a king of the old stock, appointed this to the Æquians for a law, and it was from him (according to the testi- Bk. 1. mony of Livy) that the Romans derived their ceremonial of war, pursuant to which it was not enough merely to wage war, but there must also Dion. Hal., Rom. Antiq., bk. 2. be a formal declaration of war. Others, however, attribute this to Numa Pompilius, by whom, in the seventh part of his sacred laws, the fecial college (so they say) was founded.

[3, 4] The duty of the fecials, to whom the Romans conceded at all times the highest degree of authority, may be summed up as follows: To see to it that the Romans did not make an unjust war on any confederate State, and to take cognizance of wars, alliances, and treaties, and of wrongs done to allies and other confederate States, and, if any of these States was the first to infringe any condition of a treaty, to send envoys who should orally put forth their claim and demand redress with a loud [*clara*] voice (which is called *clarigatio*) in the following terms: "I call Jupiter to witness: if against duty and justice I demand this reparation for the Roman people and myself, mayest thou never allow

NOTE: The bracketed numbers at the beginning of paragraphs refer to the topical summary found at the commencement of each chapter.

me to return safely to my fatherland." Then, if this demand was refused, the bond of alliance and friendship (if any such existed) was first denounced and then, after a fixed lapse of thirty days, war was declared and redress obtained, under the laws of war, by means of captures and hostile ravage. In any case, should the fecials forbid or disapprove, neither Senate nor consul nor popular vote might decree arms against an enemy.

[5] Now the chief of the fecials was the one called pater patratus (he being a person who had children of his own, while his father was still living). A fecial crowned his head and brow with myrtle, and thus made him their chief for all purposes of declaring war and making treaties. Plut., Rom. Quest.

It must, further, be noticed that there was no need that the declaration of war should be made in person to the king against whom the war was to be waged, but it was enough to make it to any armed body of troops. This was laid down by the fecials, first on the occasion of declaring war against Philip, and a second time against Antiochus. After a correct declaration of war all peaceable intercourse was prohibited and the soldiery were free to take up arms, collect forces, lead them against the foe, make raids, drive booty, lay districts waste and ravage them with fire and sword, cutting down crops and burning buildings, and generally might act as an enemy does.

[6] It is indeed recorded that the Tibarenians carried punctiliousness to such a pitch that they would not engage in conflict with an enemy before sending to him by fecials an honorable declaration as to the day, place, and hour, which we read was also sometimes done by the old Romans. Livy, too, gives us the formula and most ancient ritual of declaring war. Bk. 1. And Gell., bk. 16, ch. 4. And Dion. Halic., Rom. Antiq., bk. 2.

The fecials also investigated any complaints that might be made of wrongful breach of treaty; and, if the charge was sustained, they had the offenders seized and delivered to the injured parties. They took cognizance also of all wrongs done to ambassadors, for these are inviolable by the law of nations (*jus gentium*); and, if violence were done to them by any people or nation, it was the fecials' duty to insist on the surrender of those wanton offenders against that law; and our law is the same. Dig. 50, 7, 18.

The fecials, too, saw to it that the terms of treaties were carried out. They made treaties of peace and, if one had been made without due regard to law, they declared it void. They had no power, however, to give sanction to a treaty made with an ally or with an enemy or to frame a compact save where either consul or prætor had given his authorization and after due approval by Senate and people. And, lastly, if generals or captains sinned in aught against the sanctity of an oath, the fecials took the matter up and made atonement.

[7, 8] Now these were the words of the fecial law: "Of war, Cic., Laws, bk. 2. peace, treaties, truces, envoys [*oratorum* *] let the fecials be the judges." And indeed if any one entered into a treaty without the due forms, the fecials themselves would deliver him to the enemy, in order that the people might so be released from all obligation. Without a popular vote and the authorization of the Senate, nothing could be so ratified as to bind the commonwealth, and no treaty could be made without the fecials and the other solemn rites.

[9] Accordingly, when the consuls Titus Veturius and Spurius Postumius, after the defeat at Caudium, made peace with the Samnites without being empowered so to do by the people and Senate, on the terms of the Roman legions passing under the yoke, they were surrendered to the enemy in order that the peace might be repudiated, and Titus Numicius and Quintus Æmilius, tribunes of the people, were surrendered with them because they too had given their authorization to the treaty. It was indeed Postumius himself who initiated and counselled the surrender, using these words, as preserved by Livy: "Let us be surrendered by the fecials, naked and bound; let us free the people from any obligation wherewith we may have bound them; so that no obstacle may remain, either under divine or human law, to a just and pious war being entered on afresh."

[10] And this is the formula used by the fecials in making the surrender:

"Whereas these men, without warrant from the Roman commonwealth of Quirites, have pledged themselves that a treaty should be concluded and thereby have done a wrong, for that cause, with the intent that the Roman people may be quit of impious guilt, I surrender these men to you."

Cic., Offic., bk. 3. Flor., bk. 2, ch. 18. [11] In the same way, many years later, Caius Mancinus was surrendered to the Numantines for making a treaty with them without warrant from the people or authorization from the Senate.

* If this be changed to *oratores* (the usual reading), the translation will be, "Of war, ... truces, let the fecials be the spokesmen and judges."

CHAPTER II.

Of just war and just causes of war.

1. The laws of war must be observed.
2. Two kinds of conflict.
3. The object of wars is to secure peaceful life.
4. Many ills arise even out of just wars.
5. An honorable war to be preferred to a disgraceful peace.
6. Just wars permitted alike by the Law of Nations [*jus gentium*], the Canon Law and the Divine Law.
7. The authorization of a sovereign required for a just war.
8. Among the Romans the determination of questions of peace and war was in the hands of the people.
9. War may sometimes be waged without the authorization of the prince.
10. The penalties of rebellion are incurred by the fact itself [*ipso jure*].
11. Just causes of war.
12. Rebellion.
13. An outrage on the prince is deemed an outrage offered to God.
14. A rebel and an enemy quite different persons.
15. Whether the laws of war apply to rebels.
16. Civil discord.
17. The law of Solon.
18. In war not always safe to keep aloof from both sides.
19. The middle course hazardous.
20. The authority of the prince must always be supported against rebels.
21. There can not be a just cause for rebellion.
22. The fatherland or State, what it is.
23. Rebellion a most heinous offense.
24. A tyrant may be killed.
25. A lawful sovereign can not be dubbed tyrant.
26. The *lex regia*.
27. The Pope may deprive a king of his crown for cause.
28. Whether a war against infidels is just, and how far.
29. The emperor is not lord of the whole world.
30. Just war waged on heretics.
31. The soldier incurs no guilt even if the cause of war be unjust.
32. A Christian soldier may take service under a pagan ruler.
33. How far obedience is due to a pagan king.
34. A war may be "just," even though the cause thereof be unjust.
35. Whether a war can be "just" on both sides.
36. Money the sinews of war.
37. Who ought to bear the expenses of a war.
38. Trajan compared the *fiscus* to the spleen.
39. The custom of the Gauls.
40. Whether private losses sustained in war ought to be made good.

[1, 2] Cicero lays it down that in a well-ordered State the laws of war should be scrupulously observed. Alike in beginning a war and in carrying it on and in ending it, law has a most important position and so has good-faith. The rules of fecial law, to which we have just alluded, aim at securing this. For, as Cicero also says, there are two kinds of strife—one conducted by discussion and the other by force: the one appropriate to men and the other to beasts; and recourse must be had to the latter when the former can not be used. And this is taken to have been the meaning of the poetical conceit that Chiron, the centaur—whose upper part (so the fiction ran) was that of a man and his lower that of a horse—was the preceptor of Achilles, as if to show that a good prince ought not only to be endowed with wisdom and judgment and other mental gifts, but also to be trained to feats of strength and arms; for the

Offic., bk. 1.

Laws, bk. 2.

use of force against those who will not submit to what is fair nor be restrained by reason is not unjust. Nevertheless, a general, like a surgeon (it was a saying of Scipio's) ought to use steel only in the last Plut., Apoph. resort for effecting his cures.

[3, 4] War, therefore, is justifiable when its object is to procure c. 3, C. 23, qu. 1. peaceful existence and freedom from outrage, and when begun in such a way as that peace may appear to be its sole object. That is what Martianus Cæsar was aiming at in his memorable saying: "So long as a prince can live in peace he ought not to take up arms—so many and so great are the ills which spring even from what may be styled a just war." On the Kingdom of God, bk. 19, ch. 7. And these ills drew from St. Augustine the following outburst: *

"If I should stop to recite the massacres and the extreme effects hereof, as I might (though I can not do it as I should), the discourse would be infinite. Yea, but a wise man, say they, will wage none but just war. He will not! As if the very remembrance that himself is man ought not to procure his greater sorrow in that he has cause of just wars, and must needs wage them, which if they were not just were not for him to deal in, so that a wise man should never have war; for it is the other men's wickedness that works his cause just, that he ought to deplore whether ever it produce wars or not. Wherefore he that does but consider with compassion all those extremes of sorrow and bloodshed must needs say that this is a mystery, but he that endures them without a sorrowful emotion, or thought thereof, is far more wretched to imagine he has the bliss of a god when he has lost the natural feeling of a man."

So far St. Augustine. For there are certain lawful incidents of war (as Livy says) which each side must be ready to endure, just as it may also produce them—e. g. burning of crops, destruction of buildings, loss of men and horses as booty. These are of course a hardship to him who has to endure them, although not in every case dishonoring. Our first Offic., bk. 1. care, then, must be for peace, which, as Cicero says, refuses to have any truck with treachery and baseness.

Philipp. 13. [5] Further, as the same writer says, although the name of peace is musical and the thing itself both pleasant and profitable (for he can not hold dear either private hearths or public ordinances or the laws of liberty who delights in dissension and slaughter of his fellow-citizens and in public war) yet an honorable war, according to the saying of Demosthenes, is ever to be preferred to a disgraceful peace.

Dig. 1, 1, 5. [6] Just wars are, indeed, enjoined by the Law of Nations (*jus* c. 1 and 2, C. 23, qu. 1 and c. 12, X. 2, 12. *gentium*), and are permitted both by the canon law and by the law of c. 1, 3, and 5, C. 23, qu. 1. God, for God himself ordered the Jews to make war on the Amorites Deut. 2. Letter 1, to Boniface. and other peoples. St. Augustine, accordingly, wrote: "Beware of thinking that no one who follows arms pleases God, for David, a man after God's own heart, was of the military profession and so was that

* Transl. of *de Civit. Dei* by J. H., A. D. 1610.

centurion whose faith is commended by divine attestation, and other holy men also."

[7] Now in order that a war may be styled just, it ought in the first place to be declared and undertaken under the authority and warrant of c. 4, C. 23, qu. 1. St. Aug., bk. 22 against a sovereign prince, in whose hands is the arbitrament of peace and war. Faust., ch. 74. For a private person has no business to begin a war, seeing that he can, and ought to, assert his right in the courts; and it is a breach of the prince's prerogative for a private person, unwarranted by law, to assert Dig. 4, 2, 13. his right himself with royal hand. Nor is any one competent to initiate Cod. 11, 47. any variety of hostile activity without the knowledge and counsel of the prince. And he is liable under the Julian law against treason who, without the warrant of the prince, has either made war or summoned a levy or gathered an army together. And so Cato urged the recall of the Dig. 48, 4, 3. army and the surrender of Cæsar to the enemy on the ground that Cæsar was campaigning in Gaul without having been authorized by the people. Plut., on Cato of Utica and Jul. Caes.

[8] For, among the Romans the arbitrament of peace and war was in the hands of the people in whom sovereignty was vested, as appears from many passages of Livy. The Senate, accordingly, ordered the military tribunes (says Livy) to propose to the people on the earliest Bk. 4. possible date a declaration of war against Veii; and the war with Præneste, too, was entered on by an ordinance of the people after a senatus Livy, bk. 16. consult. And, after authorization by the Senate, the people bade the making of war on the Palæpolitani and on the Vestini and on the Æqui. Livy, bk. 18, 19. Since, therefore, the people has conferred on the prince by the *Lex Regia* Dig. 1, 4, 1. all its sovereignty and power, this arbitrament of peace and war is his alone and resides in him and inheres in his princely dignity in such sort Generally in Bodin on The Republic, bk. 1, last ch. that it can not be severed from him. And Holy Scripture shows that this 1 Sam., ch. 8. right has always belonged to kings.

[9] There are occasions, however, when, e. g., pressing necessity or the absence of the prince, coupled with the hazards of delay, may By inference, Dig. 43, 24, 7, 3, at end. justify a commencement of war even without his sanction, and this is es- Cod. 10, 32, 54. Dig. 42, 8, 10, 16. pecially so for purposes of defense, which is open to any one by the law Dig. 1, 1, 3. Cod. 3, 27, 1. c. 2, in Clem. ii, 11, at end. of nature. On such occasions it will be lawful not only to ward off the wrong, but also to take vengeance for it and to drive the enemy out of his c. 2, C. 23, qu. 1. own land if we can not otherwise obtain safety from him, for one can not be said to overstep permissible precaution who does what it would be dangerous to omit. And this is shown at length by Marianus Socinus Consult. 68, vol. 3. (the grandson), who holds that such a war ranks as a just war even as regards the consequences, and that the rules of war apply (consequences being deduced from their causes) and therefore that anything captured Dig. 39, 5; 2, 7, and 3. during that war belongs to the captor.

[10] And this, he says, is especially so in dealing with rebels, for every one not only may, but must, foil their attempts without waiting for the prince's command, should delay be perilous. For, one who has it in

his power to ward off a wrong from a comrade, yet forbears to do so, is as much in fault as the actual perpetrator.

c. 7, C. 23, qu. 1.

This being so in ordinary cases, what are we to say when it is the prince who is threatened, especially seeing that these machinations against the sovereignty of the prince and the peace of the State render their authors liable, by the very fact, to the penalty of treason and to death or captivity as enemies and, much more, to forfeiture of their property to the captor.

Extrav. Hen. vii. Qui sint rebelli. Gloss on Extrav. Hen. vii, qui sint rebelli and thereon Bart. and Curt. jun., Consult. 137.

Dig. 48, 8, 3, 5; and 49, 16, 7. Dig. 41, 1, 51.

Among the examples of this which Roman history furnishes, a notable one is that of Lucius Pinarius, commander of the guard at Ænna in Sicily. He detected the plot of the citizens to revolt to the Carthaginians, but had no opportunity to send messengers to inform the consul Marcellus, though he was not far away; so he suddenly made a great slaughter, and thus kept the citizens under. This measure saved Ænna and received the approval of Marcellus, and the soldiery were allowed to keep the booty which they had taken.

Livy, bk. 24.

Cicero similarly praises the conduct of Octavius Cæsar, who, without waiting for a decree of the Senate, began hostilities against Antony of his own motion; for (as Cicero says) the season for issuing decrees was not yet and Cæsar saw that if he did not seize the moment for making war the city would be overwhelmed, and so no decree would ever issue again. And the Senate ratified and approved on behalf of the public the war which Cæsar had begun on his private initiative.

Cic., Philipp. 8. Cic., Philipp. 5.

In the same way Scipio Nasica earned much praise by offering himself as the leader of all good citizens and thus crushing, by private initiative, Tiberius Gracchus and his nefarious faction. For, in such disturbed times we must do what is required by the crisis rather than by custom. Custom is ever to be followed in time of peace, says Cicero, but in time of war expediency—a doctrine on which we shall have more to say elsewhere.

Val. Max., bk. 3, ch. 2. Appian, Civ. War, bk. 1.

See bk. 2, ch. 5.

c. 3, C. 23, qu. 1.

Beside this, war may not be made save for just and necessary cause, and there should be an entire absence of the passion to do hurt and of vengeful savagery and of the lust of conquest. It was the securing of this that was the object of the rules prevailing among the Romans under their fecial law. Now he who makes war for an unjust cause not only sins, but the opinion is widely spread among men that he is nearly always beaten. For, as Propertius puts it,

c. 4, C. 23, qu. 1.

> Frangit et attollit vires in milite causa.
> Quae nisi justa subest, excutit arma pudor.
>
> ('Tis his cause which breaks or sustains the strength of a soldier; if no just cause underlie, disgrace smites on his arms.)

[11] Now the principal just causes of war are: the defense of our own empire, of our persons, of our friends, of our allies, and of our property; for no other warrant than the law of nature is needed to justify even private persons in defending themselves. A war, therefore, as Caius Pontius, the Samnite general, used to say, is a just one for those to

c. 1, C. 23, qu. 1 and c. 5, 6 and 7, C. 23, qu. 3. And c. 12, X. 2, 12.

Dig. 1, 1, 3; and 48, 8, 9; and 9, 2, 4.

whom it is necessary, and recourse to arms is a duty for those who have no hope left save in arms. A war is based on a just cause, again, when it is waged in order to regain from the enemy something which he is forcibly and unjustly detaining, in the same way as the authors of a wrong or harm done with private and not public intent are handed over to punishment: we have shown above that this is provided for by the fecial law.

c. 1, C. 23, qu. 2. St. Aug. quest. 10, on Joshua, bk. 2.

c. 1, bk. 5, Tit. 1, in vi and c. 2, C. 23, qu. 2.

And so, after the death of Saul, David made war on Ishbosheth, Saul's son, who was trying to obtain the kingship in Israel which God had given to David by the mouth of the prophet Samuel. And Romulus made war on the Albans because their dictator, Cluilius, would neither restore certain captured property nor surrender the captors.

2 Sam., ch. 2.

Dion. Halic., bk. 3.

Another just cause of war is to take vengeance for some wrong which has been unjustifiably inflicted. Thus we read that King David made war on the king of the children of Ammon for his contemptuous treatment of David's messengers. And on the same ground of a wrong done, a war will be ranked as just which arises on a State's refusal to allow passage over its territory, provided such passage is innocent; by the law of human society such passage ought to be open. Accordingly, the Jews made war on the kings of the Amorites for refusing them innocent passage into the land which God had allotted to them.

c. 2, C. 23, qu. 2 and c. 11, C. 23, qu. 8.

2 Sam., ch. 10-12.

c. 3, C. 23, qu. 2.

Deut. 2.

[12, 13] And then a prince has a most just cause of war when he is directing his arms against rebels and subjects who abjure his sovereignty; for it is a heinous offense, against both God and the prince, for subjects to resist his authority, all power being from God alone; and St. Paul tells us "whosoever resisteth the power, resisteth the ordinance of God." And a wrong offered to the prince is reckoned to be offered to God, who said to Samuel, when the people were demanding of Samuel another as king: "They have not rejected thee, but they have rejected me, that I should not reign over them." David also fought with Sheba the son of Bochri, who had stirred up the people to transfer their allegiance from David to himself.

c. 2, C. 15, qu. 6 and c. 8, C. 23, qu. 8.

Dig. 4, 5, 5, 1.

Rom., ch. 13.

1 Sam., ch. 8.

2 Sam., ch. 20.

[14] Now rebels ought not to be classed as enemies, the two being quite distinct, and so it is more correct to term the armed contention with rebel subjects execution of legal process, or prosecution, and not war. There is, therefore, no need of the authority of the prince; the authority of a local magistrate will suffice.

Extrav. Hen. vii. Qui sint rebelli.

c. 12, X. 2, 12. Dig. 6, 1, 68.

Dig. 49, 15, 24; and 50, 16, 118.

Ibid.

[15] For the same reason, the laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates and robbers (these not being included in the term "enemy" [*hostes*]). Our meaning is that these persons themselves can not proceed under the laws of war and so, e. g., they do not acquire the ownership of what they capture, this only being admitted in the case of enemies [*hostes*]; but all the modes of stress known to the laws of war

Dig. 49, 15, 5 and the whole title.

Dig. 49, 15, 24.

Dig. 49, 15, 19, 2; and 28, 1, 13; and 49, 15, 24.

Dig. 49, 15, 5.

3

may be employed against them, even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his.

By inference, Dig. 24, 1, 3, 1.

Philipp. 5.

And this seems to be what Cicero was aiming at when he deprecated the despatch of envoys to Antony and insisted that he should not be begged by words, but compelled by arms, to raise the siege of Mutina, a colony of the Roman people, and to break up the lines of investment which he had drawn round Brutus, a general, a consul-designate, and irreproachable citizen; for this (said Cicero) was not a case such as when Hannibal, an enemy of the State, was in days gone by desired by the Senate, through its envoys, to withdraw from Saguntum, but it was a case of a citizen; nor did it matter a whit (he continued) whether Antony was besieging Rome or a colony of the Roman people, founded for purposes of protection. And elsewhere the same writer says, in a letter to Plancus, that no peace ought to be concluded with Antony's faction by whom Brutus was besieged at Mutina, and he calls them loathsome robbers who ought to lay down their weapons and sue for peace, or, if they demanded it while keeping the field, ought only to get it by victory and not by bargaining.

Epist. 6, bk. 10.

Further, since there are on the prince's side all the essential elements of a just war, i. e., the right of making war and a just cause, but on the side of the rebels neither the right of making war (which we have shown above to belong to the prince alone) nor a just cause of war (the cause of a rebellion being no cause at all, as we shall shortly prove), it follows that a war waged by a prince with rebels is a most just one and that all measures allowed in war are available against them, such as killing them as enemies, enslaving them as prisoners, and, much more, confiscating their property as booty: for consequences are deduced from their causes.

Dig. 48, 8, 3, 5; and 49, 16, 7.

Dig. 41, 1, 51.

Gloss and Bart. on Extrav. Hen. vii. Qui sint rebelli. Curt. jun., Consult. 137.

Dig. 39, 5: 2(7), and 3.

And this I think a correct statement where the war is carried on under the direct sanction of the prince; but in other cases, although any one is allowed to defend himself and every one may act within the limits of his jurisdiction, yet the laws of war will only apply in a war waged by the authority and in the name of the prince; for it can not otherwise be called war. But the hostilities in which rebels engage are admittedly the very opposite of just war and so rebels can not proceed under the law of war and their captives do not become slaves. For where the cause is absent the consequence is absent likewise, and no one ought to be allowed to profit or injure others by his own wrongdoing.

Bartolus on Dig. 49, 15, 24. And c. 12. X. 2, 12 and c. 27, X 2, 24.

Dig. 49, 15, 19, 2; and 28, 1, 13.

Dig. 27, 14. 6.

Cod. 4, 48, 3.

Dig. 49, 15, 21.

[16] No obstacle hereto is created by Ulpian's response that those who in civil dissensions find themselves of the one party [*pars*] or of the other are not in the position of enemies, i. e., of persons between whom the laws of captivity and of postliminy prevail, and that therefore those

who are captured on the one side or the other do not become slaves; nor is any obstacle created by the fact that by the constitutions of the Kingdom of Spain, captures made in times of civil dissension are to be restored Span. Ordin., bk. 16. tit. 26, para. 2. sevenfold. For these rules are meant to apply in times when citizens are at variance and strife with one another, and not in times when they are contriving against the sovereign power and fighting for the overthrow of Dig. 49, 15, 21. the State; for at such times they must be classed as enemies. Ulpian Dig. 4, 5, 5, 1; and 49, 15: 26 and 19(4); and 48, 4, 11. accordingly used the word party [*pars*]; and "party" involves, says Cicero, a division of the State into two and a strife of citizen with citizen. Philipp. 13. "Faction" [*factio*] is Cæsar's term for this. Gallic War, bk. 6.

Now it would be improper to call the war waged by Antony against the State a strife of parties; it was a secession from the Roman people. This was the ground of Cicero's dissent from Cæsar when the latter gave Against Catiline, 4. his opinion that the death penalty could not be inflicted on Cethegus and Lentulus, parties to Catiline's conspiracy, owing to the prohibition contained in the Sempronian law of a capital judgment against a Roman citizen without an ordinance of the people. Cicero pointed out that the Sempronian law, being framed in view of Roman citizens, did not apply to enemies of the State, who could by no means be citizens.

And of course in the war between Rome and her seceding and rebellious allies (Latins, Campanians, Fidenates, Hernicians, Æquians, Etruscans, and others, who were subjects of Rome and not sharers in her Bks. 2 and 8. sovereignty, according to the sufficient evidence of Livy and Appian and Civil War, bk. 1. Dionysius of Halicarnassus), we read that the conquered were made to Bks. 3 and 4. endure the utmost severities of war, and that captured property changed hands as booty. And captured persons were reduced into slavery; and of a truth they were much more harshly treated than ordinary enemies, the motive being that the best way to keep rebels in their duty was to deal with them in such a way that they could not rebel again, for so long as wrong-minded persons have the opportunity of doing wrong they will want to do it.

Accordingly when the Romans stormed Capua, which, after falling under Roman sway by surrender, had defected to the Carthaginians, Livy, bk. 7. the quæstors took as spoil 70 pounds weight of gold and 3,000 pounds weight of silver, and seventy prominent Senators were executed, and about three hundred Campanian nobles were thrown into prison and died there of varying mischances; and another great horde of Campanians was sold, and all the territory and public buildings fell to the Roman people. The same treatment befell the men of Fidenæ, a Roman Livy, bk. 36. colony, when they rebelled. Ænna in Sicily, too, the quarters of a Livy, bk. 4. Roman garrison, was crushed by a terrible slaughter of its citizens (as already described) when it contemplated defection. And mention may Livy, bk. 34. be found here and there in Cæsar of similar treatment being meted out to the Gauls when they revolted, after the reduction of Gaul to a province.

[17] Further, I think that in times of civil dissension the law of Solon will not be found inexpedient. This law—which, like many other very ancient laws, was at Athens carved on wooden boards—provided that whenever a sedition occurred and the people were split into two opposed factions any one who stood neutral should be deprived of home and fatherland and fortune and be banished from the country, an exile. The philosopher Favorinus thought this was a good rule to apply also when brothers and friends fell out; for (said he), if the friends of both sides have not sufficient influence to bring about the restoration of peace, then let some join one side and some the other, and Gell., bk. 2, ch. 2. in this manner prepare a way for an arrangement between the two. And I hold that in our own days such a law would be very useful in compelling all good citizens, directly a faction is formed by bad citizens, to join their forces in order to put it down and so to save both themselves and the State from such a ruin as, alas, we now see in process in different places, to the great hurt of the Christian commonwealth and to the subversion of these Low Countries; for while good citizens trust to get peace by submitting with excessive moderation and forbearance to the evil attempts of the seditious, they are fastening on themselves a terribly severe yoke of slavery which it will be vain for them to attempt to shake off hereafter; and so, maybe, their unwillingness to imperil either fortune or life on behalf of the State will lead them and the State to an inevitable ruin. For (as Cicero says) all evil may easily be checked in its beginnings, but as it gets older it commonly gets stronger.

[18] Nor is it, as many seem to think, always the safest course to abstain from intermeddling in a war and to await as a mere spectator the issue of the war and the result to other persons' fortunes without hazarding one's own. That was the course which, when Antiochus and the Ætolians were attempting the expulsion of the Romans from Greece, their envoys tried to induce the Achæans (who were friendly to Rome) to adopt, begging them at least to remain neutral. The proconsul, Titus Quintius, showed in reply that nothing could be so ill-advised for the Achæans, seeing that, without gaining either thanks or esteem, they Livy, bk. 35. would be the prize of the conqueror.

[19] And when first the Romans were seeking the friendship of the Achæans and Philip was claiming that they should at least abstain from armed intervention, the Achæan prætor, Aristenus, in a speech to his folk, showed that they must treat the Romans either as allies or as Livy, bk. 32. enemies and that there could not be a middle path,—which (as Pontius of Samos used to put it) neither secures friends nor removes enemies. And so, at the time of the quarrel between Cæsar and Pompey, although the excellent Porcius Cato in his zeal for the commonwealth differed in many respects from the leaders of the two factions, clearly approving the attitude of neither, yet, when war broke out, he felt that he ought not

to remain in repose and so he joined that side which seemed on the whole juster; and when Brutus would have dissuaded him he wisely replied:

> Summum, Brute, nefas civilia bella fatemur:
> Sed quo fata vocant, virtus secura sequetur.
>
> (I admit, Brutus, the monstrous iniquity of civil war; but virtue will follow in security the summons of the Fates.)

and so on, as Lucan's poem continues. Bk. 2.

[20] Now, this scrutiny, which of two factions has the better cause, is admissible in a democratic or an aristocratic State, where sovereignty is divided up among rivals; but in a monarchical State all that is best and wisest will follow the authority of the prince, in whom is the sole sovereignty, against his seditious and turbulent citizens and subjects. For after the republic has decided to commit its interests to the care of Dig. 1, 2, 2, 11. one man and the people has conferred on him by the *Lex Regia* all its Dig. 1, 4, 1. sovereignty and power, that one man is the common parent of all and Nov. 98, at end. obedience to him is enjoined by the divine law, and everybody ought to Paul, Ep. Rom., 12. defend and protect him as sedulously as the fatherland.

[21] Now no just cause can be admitted (says Cicero) for taking up arms against one's fatherland: Plato declared it monstrous to employ force against one's father or mother, but worst of all against one's fatherland, for there is no breach of natural ties, no crime, which it is justifiable to avenge by parricide. Cicero calls Antony the parricide of his father- Quintilian, Declam., 286. land, for making war on his State, whose safety one ought to place before the safety of one's father. Dig. 11, 7, 35; and 1. 1. 2.

[22] I use the word 'State' [*rempublicam*] (which connotes, said Cornificius, that most sacred concept, fatherland [*patria*]) to mean not To Herenn., bk. 4. the soil itself (which would be absurd, for all soil is a brave man's fatherland), but in Cicero's sense as an assemblage of individuals compacted into a society by identity of law and community of interest. And that was the drift of Censorinus's reply to the Carthaginian envoys, as given in Appian, i. e., that the city of Carthage, whose freedom the Romans In his Punic War. had guaranteed, did not consist of walls and buildings, and that it was these latter which it was proposed to destroy.

Nor can a faction of aristocrats [*optimates*] be called a State (says Cicero), nor a seditious and conspiring populace, for an unjust populace (which he dubs a usurper) can not found a State. For although (as just said) one who is animated with hostility towards State or prince may be by birth a citizen he has voluntarily become an enemy and is called *per-*
Dig. 48, 4, 11. *duellis*, a term ordinarily applied to public enemies. And indeed there is Dig. 50, 16, 234. such an intimate connection between these two, prince and State, that no one can be an enemy of the former without being also an enemy of the latter, and conversely. Ibid.

We ought to die for our country (says Cicero), to give up ourselves Laws, bk. 2 entirely for it, to place all we have at its disposal, and, as it were, to con-

secrate ourselves to its service. And the same writer says that a man deserves encomium who goes out to death on behalf of his State and who shows that our fatherland is dearer to us than ourselves. We ought to adapt all our actions not to our own expediency and advantage, but to the well-being of State and prince. On which count Demaratus of Sparta won a large meed of praise and so did Aristides, Phocion, and Themistocles, all Athenians, and the Romans, Tarquinius Collatinus, Camillus, and Rutilius. These all bore with complete serenity wrongs done to them by their country and contrived no vengeance, though they had the opportunity of doing so. Nay, Themistocles preferred to die by poison rather than help the Persian king, to whom he was bound by many honors and acts of bounty, to make war on his fatherland, albeit an ungrateful one. And Camillus, a man of the best character, who had deserved most highly of his country, yet had been exiled, forgot the wrong and ran extreme danger in order to render help to his country, which he restored by driving away its enemies.

[23] Again, disobedience on the part of subjects and rebellion (c. 9, C. 8, qu. 1 and c. 6, Dist. 40.) against the prince is treated as a heinous offense and put on a par with heresy, and the disobedient offender is called an infidel. For how, asks (c. 16, Dist. 38.) St. Jerome, can he be faithful in the matter of God [*in substantia Dei*], (c. 24, C. 23, qu. 5.) who can not keep faith with his earthly lord? And so, no matter how grievous are the burdens which a king imposes on his subjects, they may (c. 3, C. 32, qu. 5 and c. 4, C. 31, qu. 2.) not rebel, for it is better to bear all ills than to connive at one; and hard as the burden may be which the superior has imposed, borne it must none (c. 3, Dist. 19.) the less be, and suffered with duteous self-surrender, obedience being a good thing in itself; for it is the general pact of human society that men (c. 2, Dist. 8.) must obey their kings. Wherefore, when Rehoboam, Solomon's son and successor, refused to lighten the least whit the very heavy yoke placed on the Jews by Solomon, saying that he would instead make his father's heavy yoke heavier, although it was in consequence hereof that the ten tribes of Israel, cutting themselves loose from the tribes of Judah and (1 Kings, 12.) Benjamin, abandoned their king and chose another, Jeroboam, yet they did not go quit of blame; for the Lord was wroth with the whole seed of Israel and destroyed them and caused them to be scattered for as long as He should drive them away from His face, because they had renounced (Cypr., bk. 1, quest. 6 c. and 7, qu. 1.) their union and had chosen another king for themselves.

Likewise, although King Nebuchadnezzar was an unbeliever and (Jerem. 39.) did much wickedness and ordered that his golden image should be wor- (Daniel 3.) shipped and that those who refused should be cast into the burning fiery furnace, yet Daniel said to him, " Thou art a king of kings, for the Lord (Daniel 2.) of heaven hath given thee a kingdom and power and sovereignty "; and the Lord said through the prophet Jeremiah, " Now have I given all these lands into the hand of Nebuchadnezzar, the King of Babylon, my servant; and the beasts of the field have I given him also, and all nations

shall serve him and his son and his son's son, until the very time of his land and of himself shall come; and many nations and great kings shall serve him." (Jerem. 27.) And the prophet Baruch said, "Pray for the life of King Nebuchadnezzar and for the life of Balthazar his son, that their days may be like the days of heaven upon earth." (Baruch, ch. 1.) And the prophet Ezekiel inveighs bitterly against Zedekiah, King of Judah, reproaching him for his perfidy and rebellion against his King Nebuchadnezzar. (2 Chron. 36.) David, also, though designated king of the Jews by divine authority, yet always rendered royal honors to Saul while he was still reigning, even though Saul had been reduced by divine law to the position of a private person in the kingdom and was hostile to himself: and when Saul entered into the same cave in which David was hiding and David could have cut him off alone with little trouble, he refused to do so, saying that he would not stretch forth his hand against the Lord's anointed. (1 Sam., ch. 24, 26.) And David, too, ordered the execution of the man who brought the news that he himself had killed Saul, saying, "How wast thou not afraid to stretch forth thine hand against the Lord's anointed?" (2 Sam., ch. 1.)

Kings, therefore, and princes we ought to revere with extreme dutifulness, if they be good, as being sent by God (in the words of St. Peter) (1 Epist., ch. 2.) for the punishment of evil-doers and for the praise of them that do well; but if they be bad we must endure them with patience, for the sins of princes and kings must be borne with and left to the judgment of God, who is pleased at times to visit nations for their sins with iniquitous princes. For, as Holy Writ has it, "God makes a man to reign who is a hypocrite because of the offenses of the people." (Job, ch. 34.) (Alfons. of Castile Against heres., on the word Potestas.) "For there is no power but of God," St. Paul testifies, who also bids us to obey princes. (Rom., ch. 13. Titus, ch. 3.) And St. Peter would have us be subject to our masters, even the froward; (1 Epist., ch. 2.) and he also teaches that kings are to be honored, although in those days no king had as yet accepted Christianity, but all were unbelievers and extremely cruel persecutors of the Christians; for every one knows about the cruelty of Nero and Domitian and others, which is commemorated in the writings of so many authors, yet the Christians rendered obedience to these same, in accordance with God's command, so far as nothing was required which was offensive to God, to whom they knew that obedience was due rather than to man. (Acts, ch. 5, v. 29.)

[24] Whence it is clear that, although a tyrant who forcibly and illegally usurps the throne may be killed by any one if there is no other way of getting rid of his tyranny, and although under the Valerian law, his head and goods were forfeit who had formed the plan of usurping the throne, (Plut., Life of P. Valerius. Dion. Halic., bk. 5.) yet he who is prince by right of succession and election may not be killed by a private individual, however unjust and cruel his conduct may be, nor may his people put him off the throne or defect from him. (Felinus on. c. 14 (?) X. 2, 26. Brixensis, Repertory, on word Tyrannus. Dom. a Soto, on Justice and Law, 5, 1. 8.) And this was declared by the council of Constance, (Sess. 15. Alfons. of Castile Against heres., on the word Tyrannus.) as also that all who assert the contrary opinion are heretics.

[25, 26] For a lawful prince, however cruel and unjust, can not be called a usurper; and since, by the *Lex Regia,* nay, by the ordinance of God, all sovereignty and power has been conferred on the prince as
c. 4, Dist. 21. against the people, the people can not pass in judgment on him, for the
Dig. 4, 8, 4. inferior can not bind the superior by a judgment. And this is the mean-
Isaiah, ch. 10. ing of the prophet when he says, "Shall the axe boast itself against him that heweth therewith? or shall the saw magnify itself against him that shaketh it?"

Whence Pope Nicolas in a rescript declared it as clear as day that no one of lesser authority can bind one of greater power by his findings
c. 4, Dist. 21. or impose limitations on him of his creating. Accordingly, the Emperor Marcus Aurelius's saying is correct, namely, that the magistrate is the people's appointed judge, the king the magistrate's, and God the king's. And indeed if a prince, albeit deriving his power from God, can not pun-
c. 2, in Clem., ii, 11. ish or condemn any one without a hearing, by what authority can subjects, the recipients of no such power, expel of their own motion or put off the throne the prince in whose sovereign power they are and whom they are commanded to obey, seeing that, by the law of Solon, not even a usurper may be killed without a hearing of his case and that it is repugnant to natural law that an inferior should exercise jurisdiction over a superior and the same person be both accuser and judge. And so, the *Lex Julia* (Chap. I) ordains very heavy penalties not only against those who actually kill the prince, but also against those who with wrongful intent further the inception of a plot to kill him or to effect anything adverse
Cod. 8, 8, 5: 1 and 5. to the sovereign power.

Seeing, then, that we are bound both by divine and by human law to undergo all infamy and danger and even death itself, should occasion arise, in order to save either prince or fatherland, how can there be a just cause of rebellion? What we observe in the human body applies here: All the limbs yield obedience to the head, as being the nobler part, no matter what it orders, and they refuse no risk in order to preserve it; so also subjects, the limbs of the civic body, should put the safety of the prince, who is its head, above all private advantage. Now there was among the Jews a sect of men, held in high esteem and called Essenes, i. e., executors of the divine law, who championed this doctrine, maintaining that kings and princes, irrespective of their character, ought to be inviolable by their subjects, as being sent by God.

Nor will any one attach importance to the case of Tarquinius Superbus, whose wickedness led to his expulsion from his kingdom, for, in the first place, he was not a king but an unmistakable usurper (having obtained the throne not in lawful manner, but by force, after having most
Dion. Halic., bk. 4. basely slain his father-in-law Tullius); and in the second place, as the jurisconsult Proculus says, the question to be asked is, What does the
Dig. 1, 18, 12. law say that we ought to do? and not, What is done at Rome? For it is

a mistake (pointed out by Cicero) to imagine that everything for which a precedent can be found is lawful. What has been said applies where the supreme sovereignty is in the hands of a single person; but in cases when it is lodged in the people or in an aristocracy [*optimates*] it is undoubtedly lawful to deal with a tyrant by legal process, if time allows; and, if not, he may be got rid of out of our midst by any means whatsoever. It was the former course which the Senate adopted in order to get rid of Nero, and the latter in the case of Maximinus. For it is noteworthy that Roman emperors were not vested with full sovereignty, although several of them tyrannically usurped it; and this is shown by the expression which Suetonius employed about Caligula: "He almost changed the character of the chief magistracy into a monarchy," the Roman Emperor being nothing else than chief magistrate and the ultimate sovereignty being with the people.

Appian, Prœm., l. 1.
Bodin, on The Repub., bk. 1, ch. 8.

[27] For kings who abuse their position the Pope has various modes of restraint and of compelling them to deal justly, for he is God's regent on earth and has received from Him both swords, the spiritual and the temporal, for the peace and preservation of the Christian commonwealth. Pope Nicolas, accordingly, reproved Lothair for his sins, and Gelasius used threats to Anastasius. Innocent I excommunicated the Emperor Arcadius for countenancing the expulsion of St. John Chrysostom from his see. Nay, where the interests of the Christian commonwealth require it, the Pope can not only restrain, he can also depose, just as God (whose vicar the Pope is) deprived Saul of his kingdom and raised up David in his stead. Accordingly, Pope Zacharias deprived Childeric III, King of the Franks, and absolved the Franks from the obligation of their oath. Innocent IV in the first instance excommunicated the Emperor Frederic II for his crimes: and, when this measure proved ineffective, he adjudged him unworthy of the empire and freed his subjects from the tie of their sworn allegiance. And the same Pope gave to the King of Lusitania his brother, the count of Bologna, as a colleague, because of his neglect of duty.

c. 26, C. 23, qu. 5.
c. 13 X. 2, 1 and c. 1. Extrav. comm. 1, 8.
c. 21, C. 2, qu. 1.
In c. 3, C. 15, qu. 6.
c. 10, Dist. 96.
1 Sam., ch. 6.
c. 3, C. 15, qu. 6.
c. 2, bk. 2, Tit. 14, in vi.
c. 2, bk. 1, Tit. 8, in vi.

Now, to attribute to the people the power to do this (as some would like to do) is not only absurd and improper, but also subversive of the State; a king is not to be forthwith branded tyrant and unjust, because in some little detail of his rule he does not please the people, for on that showing kings would be nobodies. Why, even Moses, the justest and sagest of magistrates, would be pronounced a tyrant, for almost all his injunctions and prohibitions were displeasing to the people. Moreover, we ought not to talk about "monarchy" and "royal power" in cases where a State is governed by a king subject to the approval of the people, since the prosperity of the State is then dependent on the people—than whom nothing could be more foolish and extravagant and, when it blazes out against the good, more insane. For, as Livy says, it is characteristic

Fern. Vasquez, Illustr. Quest. 1, 5, 10.
Hotman, Franco Gallia.
Girard de Bernard, Hist. France, bk. 3.

of the mob to be either humble servants or haughty masters. And Xenophon, who was at once an able commander and a philosopher, testifies that popular power is fatal to virtue and can not be established save by the removal of all good men—a thesis adopted by Seneca in his terse question, "Who that is pleased by virtue, can please the people?" Consistently therewith we read how, among both Athenians and Romans, citizens of outstanding distinction, who had rendered excellent service to the State, were unjustly made to suffer ostracism, exile, and death through the malevolence of a stupid and ungrateful rabble.

Now, that was a brilliant prophecy that Anacharsis, the Scythian, made of the speedy downfall of Athens, based upon the fact that, though her wise men might give advice, yet it was her fools who gave the decision; for he observed how her Senate looked to the people to take measures for the well-being of the State (a matter of quite sacred importance)—which is as much as to look for wisdom in fools and madmen. Of a truth, highly ridiculous as it would be to divide the whole of every one's wealth equally among the citizens, it would not be so ridiculous as
In Method. hist., ch. 6.
to do the same thing with the ultimate sovereignty, because (as Bodin neatly puts it) any one can enjoy wealth, while governing wisdom is the rarest endowment of nature; and, much as an individual tyrant is to be dreaded, a mob of tyrants is more to be dreaded still. And those who laud the popular sovereignty of the Romans seem not to have read their history aright and not to have given adequate consideration to the miseries which so many and frequent seditions, secessions, struggles, and civil wars brought upon the State, all of which were entirely due to the holding of sovereignty in common, with the attendant difficulties of equal distribution thereof. But these numerous matters the plan of my treatise does not allow me to discuss.

[28] To continue the consideration of the just causes of war: War
Cod. 1, 11, 6.
may not be declared against infidels merely because they are infidels, not even on the authority of emperor or Pope, for their infidel character does not divest them of those rights of ownership which they have under the law universal [*jus gentium*], and which are given not to the faithful alone but to every reasonable creature. For the earth is the Lord's and
Genes., ch. 1.
the fulness thereof, the world and all they who dwell therein, and the
Matth., ch. 5, end, and ch. 6, begin.
Lord makes his sun to rise on the just and the unjust. Accordingly, although Nebuchadnezzar was an unbeliever, yet God gave him kingdom
On c. 4, Reg. jur. in vi, in 2nd part, Relect. §9.
and power, as just said. This opinion is widely received, as Covarruvias shows.

[29] Nor is a war with infidels to be called just on the ground that (say) they refuse to acknowledge and obey the emperor as the lord of the whole earth, in accordance with the doctrine which has very many
Cod. 7, 37, 3. Dig. 14, 2, 9. Cod. 1, 1, 1. Dig. 49, 15, 24.
authorities in its favor. For men of the profoundest learning have clearly demonstrated that this widespread opinion is false and that the
Card., Alb., Fulg., Alc., Chas., Domin. de Soto and others.

emperor is not the lord of the whole earth. These are enumerated and followed by Covarruvias and Fernando Vasquez.

On c. 4, Reg. jur., in vi, in § 9 aforesaid.

Illustr. Quaest., 1, 20 and following ch.

This, then, is no ground on which the emperor can make a just war on unbelievers who are not under his sway: for no one can punish a person who is not in his power. More than that, such a war could not be rendered just by the authority of the Pope, for he has no jurisdiction, whether temporal or spiritual, over unbelievers, except as far as it is needed for the peace and prosperity of the Christian commonwealth; and it is not a function of the church to punish unbelievers who have never received the Christian faith, according to St. Paul in his Epistle to the Corinthians: "For what have I to do to judge them that are without?"

Dig. 2, 1, 20. And c. 2, bk. 1, Tit. 2 in vi. And Cod. 3, 15.

Ch. 5.

[30] On this, Thomas says that the prelates of the Church have received power over those only who have once subjected themselves to the Christian faith: and so a just war may be made on heretics who have abandoned the Christian faith. And Alfonso of Castile has on this topic a fine passage. The grounds on which a just war may be waged with infidels are, then, those on which one may be waged with any other people, and also that they are found hindering by their blasphemies and false arguments the Christian faith and also the free preaching of the Gospel rule, this being a wrong to Christians, who are entitled to preach the Gospel over the whole world.

Lawful punish^t of heret., bk. 2.

c. 11, C. 23, qu. 8. Innoc. and doctors in c. 8, X., bk. 3, Tit. 34.

Thos. Aquin. 22, 10, 8.

[31] Now these just causes of making war ought to be weighed with deliberate judgment by the princes and kings, in whose hands is the authorizing and the planning of war; but if it chance that their motive for making war is human greed, that will not be imputed to the soldiery as a sin, seeing that they owe obedience to their prince. Accordingly, St. Augustine writes: "Should a just man happen to be serving as a soldier under a king who is even a sacrilegious person, he may rightly fight under his command, observing the ordered conditions of citizenship; for what he is commanded is either certainly not against God's precèpts or it is not certain whether it be; so that, maybe, the iniquity of the command may involve the king in guilt, while the conditions of his service establish the innocence of the soldier."

c. 4, C. 23, qu. 1.

Bk. 22 against Faust. Manich., ch. 75, and c. 4, C. 23, qu. 1.

[32] It is, therefore, permissible for a Christian soldier to campaign under a pagan commander, for even Julian the Apostate had Christian soldiers and they obeyed him when he said, "Engage in battle for the defense of the State." But when he said, "Engage in battle against the Christians," they recognized their heavenly commander. And we are told that when the same emperor tried by the gift of largess to lure them to the sacrifices of the gentile gods, they returned him his largess and professed their Christianity with the utmost willingness in their longing for martyrdom and were dismissed the service. We read too how Marcus Aurelius Antoninus brought to a conclusion the war

c. 94, C. 11, qu. 3.

Sozomen, bk. 5, ch 17. Cassiodorus, bk. 6, Tripart. hist., c. 30. Nicephorus, bk. 10, ch. 23.

Paul Orosius, bk. 7, ch. 15. Eusebius, bk. 5. Eccles. hist., ch. 5. Niceph., bk. 4, ch. 12.

Acts, ch. 1.

against the Marcomanni, overcoming the Sarmatians, the Vandals, and the Quadi, by the aid of the prayers of his Christian stipendiaries in which they besought God to rain on themselves and to thunder on the enemy. This demonstrates that subjects may campaign under a pagan and even heretic commander, unless it be transparently clear that the war is unjust; for service is due to God rather than to man.

c. 5, C. 15, qu. 6 and c. 94, C. 11, qu. 3.

1 Pet., ch. 2.

Dan. 2.

Matth. 22.

Rom. 13.

[33] Now, although we are taught that we must obey even an infidel and unjust king, yet there are limits to this obedience; whence, although the Children of Israel were ordered by God to obey King Nebuchadnezzar, yet when that king issued his decree that they should worship his golden image (a decree which overstepped the bounds of royal power) the best of the Children of Israel preferred to be cast into the burning furnace rather than to obey the king's decree; and God so approved their choice that he saved them harmless from the fire. And what Christ says in the Gospel is of the same import: "Render unto Cæsar the things that are Cæsar's and unto God the things that are God's": a teaching which the Apostle Paul most plainly set forth, saying, "Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honor to whom honor."

From the foregoing it may be gathered that our remarks so far about just causes of war deal rather with considerations of fairness and goodness and propriety, and not with the character of the legal result which is produced. Now, seeing that the right to make war is a prerogative of princes who have no superiors, discussion of the equity of the cause is inappropriate.

Dig. 17, 2, 3.

Institutes, 1, 10, pr. Dig. 23, 2: 1 and 54.

Dig. 34, 9, 13; and 38, 11, 1.

Quintil., bk 5, ch. 10. Dig. 50, 5, 2, pr.; and 49, 14, 16. Cod. 5, 34, 11.

Bk. 40.

Dig. 1, 7, 2. Cicero, Topic.

Dig. 28: 1, 1; and 50 generally; and 40, 8.

[34] A war may in one sense be styled just and yet not be waged for just cause; for the word "just" has varying meanings (as Budæus has remarked) and does not always indicate justice and equity but sometimes signifies a certain legal completeness. It is in this latter sense that we use the word "just" in connection with marriage and matrimony, and the age of attaining majority, and competence to bring suit, and sonship and liberty [*justæ nuptiæ, justum matrimonium, justa ætas, justa persona litem instituendi, justus filius, justa libertas*]. And Livy speaks of a just battle, using the word in the same sense: and it is in a like manner that the phrase "just war" is employed, meaning thereby a war publicly and lawfully waged by those who have the right of waging war.

Dig. 49, 15, 24.

Dig. 50, 16, 118.

We accordingly read in Ulpian: "Enemies [*hostes*] are those on whom the Roman people has publicly declared war or who have publicly declared war on the Roman people, but others are termed brigands or robbers" [*latrunculi vel prædones*]. And Pomponius says, "The term 'enemies' [*hostes*] implies that they have publicly declared war on us or we on them; all others are thieves or robbers." In such a war, even though it be not begun with just cause, the laws of war and captivity and postliminy, such as are appropriate in the case of enemies, are called into

operation. This is abundantly evidenced by the fact that, though the Romans never began war save on just causes (their fecial law requiring close heed to that), yet their enemies, who could not have just cause (for both sides could not have it), became owners, even by Roman law, of the property which they captured in such a war and reduced captured persons into slavery; and that held good even where the enemy's case was palpably unjust.

Dion. Hal., bk. 2.

Dig. 49, 15, 5.

The jurisconsult Paulus is conclusive on this point in the passage where he declares it a dictate of natural equity that a man who has been wrongfully captured by foreigners and then has returned to his country reacquires his former legal position, to wit, by the law of postliminy. It is implied herein that a man becomes a slave if taken prisoner even by an enemy who is waging an unjust war, for there would not otherwise be any need of the fiction of postliminy any more than there is when a man is captured by brigands, in which case he does not become a slave.

Ibid.

Dig. 28, 1, 13; and 49, 15: 19(2) and 24.

Nothing more is needed, then, so far as concerns the legal effects which are produced and the bringing into operation of the laws of war, than that the war should be waged by parties who are within the definition of "enemies" and who have the right to wage war. And, on this way of looking at the matter, it seems possible to defend the opinion of Alciatus and of Fulgosius, namely, that there can be a just war on both sides. This is contrary to the opinion which is accepted by experts and which, if it be just cause of war that is adverted to, is highly reasonable, seeing that, enemies being in conflict with each other, their rights must be in conflict too, and one and the same cause of war can not be just both for this side and for that.

Fulgosius and Jason on Dig. 1, 1, 5: Petr. de Ancharan. on the rule 'Peccatum' col. 13, verse Tertio quaero: Aretinus on Dig. 28, 1, 13: Alberic. de Rosa. on Cod. 1, 1, 4, col. 6: Abb. on c. 13, X. 24, 2 —all of whom Natta quotes and follows, Consult. 284.

Alc., Emblems, 2, last ch.

Fulg., on Dig. 1, 1, 5.

[36] Further, money is often declared the sinews of war; and that was the bearing of the jest of Titus Quinctius Flamininus, at the expense of Philopœmen, the Achæan prætor, who was furnished with much cavalry and heavy-armed soldiers, but little money, namely, that he had hands and legs, but lacked belly, which was also a description of the prætor's habit of body.

Plutarch, Apophth.

[37] The question has, accordingly, often been raised, who ought to bear the expense of war: prince or people? The general view is that if the prince has royal revenues assigned him by the citizens it should be at his expense that the war is conducted. And this is a very reasonable view, too, for it is a common and oft-recurring principle with philosophers and legislators that all principalities and kingdoms and empires exist wholly for the public benefit of the citizens and not for the benefit of the heads of the State. Cicero, accordingly, writes: * "There are two precepts of Plato to be observed by all men of authority in the government. The one is, in such sort to assert and defend the public interest that all their actions should refer to that, without any regard to their

Angel. on Cod. 8, 11, 18.

Jason and Zasius on Dig. 23, 3, 12.

Gul. de Cuneo, Baldus and Cyn. on Cod. 1, 2, 11.

Offic., bk. 1.

* Translated by Roger Lestrange, A. D. 1680.

own advantage. The other is, to attend the service of the whole in such sort that while they are serving one part they do not abandon another. It is in the administration of a government as in the case of a ward: the commission has a regard to the benefit of those that are delivered up in charge and not those to whom such a charge or care is committed."

Quest. illustr., ch. 1 and following.

Fernando Vasquez discusses this doctrine at length. If, however, the prince has no sufficient revenues, the whole realm ought to bear the expenses of war; and no definite limit to the contribution for this purpose can be assigned. For, in the words of the general Cleobulus' answer to the allies of the Athenians in the war against Philip, when they clamored for the fixing of a definite contribution, "War admits of no fixed ending." And it points in the same direction, that, in Cato's words, every well-ordered State should display domestic industry and a well-filled treasury and smallness of private fortunes; and Cato has posited the contrary as the vice of times of moral corruption, namely, public penury and private wealth, seeing that luxury and sloth soon corrupt a State (as Sallust narrates and St. Augustine proves).

Baldus on Dig. 1, 16, 5. Boerius in treatise on Custody of the Keys. Plut., Life of Demosth. Kingdom of God, bk. 5, ch. 12.

Princes ought, nevertheless, to keep in mind that very moderate reply made by Tiberius Cæsar to the treasury officials who wanted the provinces to be burdened with tribute: "A good shepherd shears his sheep, but does not flay them." And another memorable saying is that of Trajan, when his wife, Poppœa Plotina, chid him for the chicaneries with which his procurators were vexing the provinces so sorely: he said that he was beginning to loathe such vile extortions, and he drew a remarkable parallel between the fiscus and the spleen, saying that just as in our bodies, when there is an enlargement of the spleen, the rest of the organism wastes away, so in a State, when the treasury of the prince is overswollen, the other members grow feeble and diseased.

Sex. Aurel. Vict. in Jul. (?).

It is deducible from what has been said that a citizen is not bound to follow the prince to the wars at his own expense, but that he ought to receive pay either from the prince or from the State. Should, however, very pressing necessity arise, e. g., in defense of prince or State, every one, regardless of sex or rank, is bound to join in the operations of the war; and the laws of the Kingdom of Spain visit with very heavy penalties those who shirk this duty.

Aretinus on Instit., 4, 6, 13. Bartolus on Dig. 38, 1, 13, 1. Oldra. Consult., 234. Cas. on Customs of Burgundy, title de just. § 4. Boerius, decis. 303. Span. Ordin., l. 3 and 5, tit 19, p^t. 2.

[39] And this explains the custom of the Gauls to summon at the beginning of their wars the council of warriors, which by their common law was attended by all men over puberty, in full armor, and the last to arrive was put to death with all manner of torture in the sight of the assembly. So also a feudal vassal is under an obligation to assist his lord in a just war, even at his own expense.

Cæsar, Gallic War, bk. 5. By inference from Dig. 38, 1, 18.

[40] The question may be raised whether any loss which may be incurred by reason of the war ought to be made good. Well, where a man goes to the war for the defense of the State without pay, he deserves

Specul. on Tit., de feu § quoniam ver. 12. Baldus on Feud. Law, bk. 1, tit. 17. Ludov. Rom. on Dig. 36, 1, 6, 6.

to be reimbursed any loss which he may suffer on that account, but loss sustained in war by a soldier who is serving for pay will not be made up to him—save that by the laws of the Kingdom of Spain loss of this kind is ordinarily to be made good out of any booty that may be taken. On the other hand, one who has been summoned to an unjust war has no action at law either for the recovery of pay or for reimbursement of loss, for no right of action is allowed to rise out of circumstances of disgrace [*ex turpi causa nulla datur actio*].

By inference from Dig. 14, 2, 2, 1.

By inference from, and Angel. on, Dig. 14, 2, 1.

Span. Ordin., l. 4, tit. 25, par. 3.

Dig. 45, 1, 26 and 27; and 17, 1, 6, 3. Innoc. in c. 13, X. 2, 24.

Chapter III.
About the duel or single combat.

1. Why duelling is forbidden.
2. Duelling forbidden when arising out of defamation.
3. The usage of the duel very old in Spain.
4. The duel was a usage of several peoples.
5. Custom does not render duelling lawful.
6. The custom of duelling alien to Greek and Roman institutions.
7. Lawfulness of duelling with an enemy.
8. David slew Goliath in single combat.
9. Single combat very important in war.
10. The end of a war sometimes issues out of a duel.
11. The combat between the Horatii and the Curiatii.
12. Not always safe to obtain the result of a war by a duel.
13. Of Metius Suffetius.

The practice of duelling has, with complete justification, been forbidden by the Canon Law, as a detestable invention of the devil; and, with a view to its utter abolition, various censures and penalties have been ordained, not only against the combatants themselves but also against those who initiate or counsel, or are even present at, the combat. (c. 22, C. 2, qu. 5. And c. 1 and the whole title, X, 5, 35. And whole title, X, 5, 14. And Council of Trent, sess. 19.)

[1] The reason is that this mode of settling differences subverts the judicial system and all the legal authority, with its provision of actions-at-law whereby every one may assert his right in court. There is, too, the impropriety of a man setting himself up as his own law-giver and judge, the very reason for the existence of laws and magistrates being that they may discriminate lawful from unlawful and award to every man his right. (Dig. 4, 2, 13. Dig. 1, 1, 1.) Moreover this mode of settling disputes may do violence to justice, for numbers of persons who have stupidly and foolishly submitted to the arbitrament of the gods of war a case which, both in law and in equity, was an excellent one, have died in the fight. (c.2, X, 5, 35.) Besides, it is wrong to tempt God, and this is what it amounts to when a duel is fought (as often happens) in order to clear up the truth. Lastly, both divine and human law forbid homicide; now a duel very often results in homicide; so the duel may be said to be prohibited, since the prohibition of anything is deemed to involve the prohibition of everything by which that thing is brought about. (c. 22, C. 2, qu. 5 and c. 1, X, 5, 14. By inference from Dig. 23, 1, 16.)

[2] There are, however, some who hold that this kind of battle is permissible when one's reputation has been assailed, for (say they) he who does not trouble about his reputation is a savage, reputation being above profit and in the same rank as life. (Baldus on Feudal Law, bk. 2, tit. 53, c. 1, Coll. 5. Cagn., Decius, Curt. Sen., Curt. Jun., and others whom Fern. Vasquez mentions in Quest. illustr. 1, c. 47.) I do not, however, accept this view. (Dig. 29, 4, 26. Dig. 40, 2, 9. In Cod. 1, 9, 14.) For (in the emperor's words) courts are provided in active operation and the protection of the public law made accessible to all precisely in order that no one may arrogate to himself a right of private vengeance; nor can he who seeks from the judicial authorities redress for an

injury offered to himself or his family be considered reckless and careless of his honor.

[3] Further it is notorious that this kind of combat was in vogue in very ancient times, especially in Spain, as much for the display of valor as for the discovery of truth; for when Scipio returned to Nova Carthago for the performance of his vows and for the gladiatorial show which he had arranged in honor of his late father and uncle, the spectacle was such as Livy describes in the following passage: Bk. 8.

" The show was not of that class of men whom the trainers [*lanistæ*] usually procure, slaves, to wit, and freedman and such as sell their blood; but all the service of the combatants was voluntary and unpaid. For some were sent by the petty princes to show an example of the natural courage of their people; others came forward to fight in compliment to their general; others were led to give and accept challenges by a spirit of emulation. Some decided by their swords disputes which they had not been able or willing to settle by argument, with an agreement that the decision was to be in favor of the victor. Nor was this confined to men of obscure rank, but it included such distinguished and well-known men as Corbis and Orsua; these latter were cousins who had a dispute about the chieftainship of a city called Ibis, and they arranged that they would adjust it by the sword. Corbis was the elder. The father of Orsua was the last chieftain, having succeeded to that post on the death of his elder brother. Now Scipio was anxious to settle the dispute by argument and thus allay their jealousies, but they both asserted that they had refused that to their common kindred and that they would have no other judge, divine or human, than Mars. The elder's pride was in his strength, the younger's in his youth, and each preferred death to becoming the subject of the other. And as every effort to divert them from their madness failed, they gave the army a glorious show, and at the same time an illustration of the mischiefs that are wrought among men by the thirst for power. The elder, by reason of his experience in arms, and his address, easily mastered the unscientific exertions of the younger."

So Livy.

[4] In later days, this mode of settling disputes was allowed among the Spaniards (although its inequitable character was admitted) for the purpose of avoiding lawsuits, in certain cases and subject to certain conditions. And the Lombards, too, had the custom of referring a controversy to the duel in certain cases, if there had been some default in the judicial proceeding and the judge's decision was impugnable. And the Emperor Frederic Ahenobarbus decreed that on certain occasions matters should be left to the arbitrament of a duel: and a glance at the Salic law shows that the custom of the Gauls and such differs much from that of the Lombards, one of their extant constitutions being the follow-

Span. Ordin., bk. 8, tit. 11, par. 3.
Tit. 4, On lawsuits, part 7.

Lombard Laws, tit. qual. quis se defen. deb. and tit. de purg. rei and tit. de hom. lib. hom.

Feudal Law, bk. II. tit. 53, c. 1, §§ 1 and 10.

ing (of Philip): "When a man is charged with some secret crime of a capital character, and he is admittedly a person who could be subjected to torture, but could not otherwise be condemned, let him, on the demand of the accuser, undergo wager of battle."

On Instit. 3, 1, 5. Joannes Faber deals with this constitution: and Guido Papæ refers Decis. 617. to it, adducing and explaining a certain other imperial constitution about the procedure in the duel and the grounds upon which it can be ordered. Decis. 191.

The duel is customary and very frequent in Italy, especially in defense of a man's honor. Hence there has been a considerable amount of careful discussion, on such points as, What matters may be settled by the duel? Which of the two adversaries is the challenger, which the challenged? Who are allowed the duel? When may the duel be declined? When may an auxiliary, ordinarily called a champion, be allowed? What about choice of weapons and ground? Must the opponents take the *jusjurandum calumniæ* (i. e., the oath that they are not wantonly making or denying the charge)?—and many other questions which frequently crop up in connection with this kind of battle.

Decius, consult. 97. Curt., Jun., consult. 173. Curt., Sen., on Dig. 12, 2, 31. Cagnol. and others mentioned by Fern. Vasq. in Quest. illustr., bk. 1, ch. 40.

[5] Numerous men of great learning, although well aware that this custom is invalid as being contrary to law—especially in view of the canon law's express prohibition of it to persons with a *locus standi* in either forum, when the question raised is one of sin—have, however, discussed the perversion just as if it were valid, seeing that the custom has held its ground in point of fact and that what obtains in fact is at times assimilated to law.

Cod. 8, 52, 2 and 1, 14, 5.

c. 13, X, 2, 1 and c. 1 and 2, X, 5, 32.

Dig. 28, 7, 20; and 40, 4, 54.

[6] Indeed, that custom of referring disputes between citizens and allies and comrades to single combat is not only repugnant to Christian institutions, but also far removed from the ancient discipline both of the Greeks and the Romans; for they reckoned it highly disgraceful that allies in war, who ought to reserve their joint strength for the upholding of their common cause, should be led to fight with one another, as often was the case, by foolish and dangerous vanity, and, rather than have their differences adjudicated on by laws that were common to both parties, should wish them to be adjusted by the sword: which is indeed a very unreasonable method and is just as if two philosophers or jurisconsults should decide with swords the question which of them is the wiser.

Alexand., consult. 107, col. 6.

And of all the varieties of injustice there can be none baser or madder than that whereby a frail and slight person, to whom offense has been given, is branded with infamy unless he meets his opponent, no matter how much stronger than himself, in armed encounter and hazards his life: especially having regard to the provision of nature (pointed out by Bodin in connection with the Scythians) whereby those with the minimum of intelligence possess the maximum of bodily strength. And, in truth, on this reasoning even the strongest men if compared with beasts which surpass them in strength might deserve to incur infamy.

Method. hist., c. 5.

[7] A wise man ought, then, to exhaust all other expedients before having recourse to arms. But of course no blame attaches to those who resort to this kind of conflict for the public good and not for vengeance or private hate, for their conduct is even laudable. Accordingly a man Dig. 3, 1, 1, 6. Hiero. Cagnol., on who engages a public enemy in single battle pursuant to the orders of his Dig. 50, 17, 125. general or with his consent (apart from which such irregular fighting is not permissible) not only does not sin against the laws and statutes of the Popes, but ought also to derive great glory from his act, as in the case of Torquatus, Corvinius, Marcellus, Scipio, Æmilianus, and others. For such combats are demonstrably lawful, upon the same principle as that upon which a war is just in which the combatants meet a glorious death on behalf of fatherland or Church. For there is no kind of fight- c. 9, C. 23, qu. 8 and c. 46, C. 23, qu. 5. ing with an enemy in the course of a war which amounts to tempting Span. Ordin., bk. 3, tit. 25. God, within the meaning of the divine prohibition; to destroy an enemy is not an act of homicide, nor such as natural law forbids, but is part of the duty of a good soldier. c. 13 and c. 41 (?) C. 23, qu. 5.

[8, 9] Accordingly it was just as proper for David to lay Goliath low in single fight as in the course of a general engagement. Indeed 1 Sam., c. 17. these encounters not infrequently determine the issue of the whole war. Livy, accordingly, when dealing with the fight between Torquatus and Bk. 5. Gallus, says: "This combat was so decisive of the whole war that the Gallic army fled from their camps in a panic and crossed into Tibur and, shortly afterwards, into Campania." The same thing happened in the Social War: an enormous man, one of the Gallic auxiliaries whom Lucius Cluentius had raised for his struggle with Sulla, rushed forward and challenged any one on the Roman side and a Numidian of small stature slew him: the Gauls were thunderstruck and fled pell-mell: and after their line of battle had been thus broken, the rest of Cluentius' men refused to stand and fled in a panic to Nola. Appian, Civil war, bk. 1.

[10, 11] Sometimes the commanders-in-chief arrange such encounters, both sides being represented either by individuals or by bands of equal size chosen by the chiefs, and the issue of the encounter is to determine the war. We read that this was done in days of old by Tullus Hostilius, King of the Romans, and by Metius Suffetius, King of the Albans. For each side was suffering loss through the frequency of battles fought with equal strength and so an abridged form of the war was arranged (in the language of Lucius Florus) and the fate of each side was left in the Bk. 1, ch. 3. hands of the Horatii and Curiatii respectively, two sets of triplets; and a solemn treaty was first struck between the two kings and peoples and conditions agreed to whereby the conquered side was to be surrendered to the conquering. Livy, bk. 1.

I do not think this kind of combat is improper, for even Thomas Aquinas (who compares the duel to trial by lot and who disapproves 2, 2, quest. 95, art. 8. of it if the object is to prove or discover some secret matter) does not

disapprove where the combat is for purposes of discrimination and the settlement of a controversy—such as certainly was the case in David's encounter with the Philistine, which met with God's approval. And I think this sound when the combat is arranged between the commanders-in-chief or by the authority of those who have the right to make war, with a view to avoid its evils. And we read that, when this is so, permission for the combat has occasionally been granted by the Roman Pontiffs. And so, after Charles of Anjou and Pedro of Tarragona had been warring for a long time about Sicily, they agreed, with the approval of Pope Martin, to decide the dispute by single combat. Froissart, bk. 1.

[12, 13] I can not think that this manner of settling disputes is altogether safe, seeing that it is foolhardy to stake the sum of one's fortunes upon the hazard of the one or the other individual, or that it will in every case put an end to the war. What happened in the case of the fight between the sets of triplets shows this; for Metius Suffetius, through staking his fortunes and the whole result of the war and the valor of his army on the fortune and valor of the Curiatii, lost in a moment his kingdom and the liberty alike of himself and his men, in the defense of which they had been fighting for many years; and though the Romans were victorious by the award of fortune, to which they rashly had submitted themselves, still they did not find their victory altogether secure; for though Metius Suffetius did indeed, forthwith upon his defeat, surrender himself and all he had to the Romans, yet, when subsequently the expedition to Veii furnished the occasion, he repented of his rashness and tried to betray the Roman army. Livy, bk. 1

Wherefore, when the safety and liberty of us all, or the whole of our possessions, is in the balance we ought to fight with all our available strength; for otherwise not only will the conquered blame his rashness, but the victor will also not gain complete safety. For (as Livy says) a man's spirit is finally conquered when the confession has been extorted from him that he has been beaten in a just and solemn war, not by stratagem nor by chance, but after a hand-to-hand engagement of all his forces. Nor, in a word, is it credible that any nation or any individual—as the Roman Senate found out in the case of the Privernians—will consent to stay in an irksome condition, longer than is unavoidable. Livy, bk. 8.

Chapter IV.

About Hostage-seizing [Pigneratio], which is called Reprisals.

1. Hostage-seizing permitted by very ancient custom.
2. In what circumstances permissible today.
3. Whether the custom is approved by law.
4. Sometimes an innocent man is punished, for sufficient cause.
5. A man, even though innocent, may thus be punished through his property but not corporally.
6. Hostage-seizing to the hurt of innocent persons illegal.
7. St. Ambrose reproved the Emperor Theodosius.
8. The principle underlying *l. vindicari C. de pœn.* (Cod. 9, 47, 20.)
9. In hostage-seizing it may happen that innocent persons are killed.
10. Hostage-seizing only permissible subject to the same conditions as war.

[1] It is clear that the forcible seizure of hostages (Greek *androlepsia*) was permitted by the customary law of most ancient times: for it was a very old usage that if a homicide fled into a foreign town and the townsmen would not surrender him on the demand of those who were entitled to deal with the crime, these latter were allowed forcibly to take hostages. For we read of the following ordinance: " If any one has met with a violent death, his clansmen and blood relatives have the right of androlepsy until there has been a judicial inquiry and those guilty of the homicide have been either punished or surrendered: up to three persons may be seized, but no more."

These words are used by Demosthenes in his speech against Aristogiton and the orator asserts in that context, but perhaps only out of devotion to his case, that hostage-seizing is lawful, not against those who shelter a fugitive homicide, but against those only among whom the killing took place. In Julius Pollux we read, however, that it was lawful also against those who had sheltered a fugitive homicide and who had not given him up, on demand, either to punishment or to vengeance and had not themselves fitly punished him: Budæus has commented on this. On Dig. 48, 19, 16, 8.

[2] The conditions in which alone that kind of hostage-seizing which we call reprisals is lawful at the present day, are these: Brigands or pirates or others belonging to some country or other have committed homicide or other crime or have done some unjustifiable damage and the victims have not succeeded in obtaining from the government of that country or from those who have given asylum to the wrong-doers either their surrender or punishment: in such circumstances hostage-seizing is legitimate.

[3] Whether this is a lawful custom is, however, a subject of controversy. An especial point is made of the iniquity and injustice of inflicting punishment on an innocent person for the fault and offense of another, for liability to punishment attaches to the doer of the wrongful act. It is written: "The innocent and the guiltless thou shalt not slay" and "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him." And "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin."

c. 7 and c. 8, C. 1. qu. 4. Dig. 48, 19, 26. St. Aug., q. 8 on Joshua. Cod. 9, 47, 22. And c. 2, X, 1, 2, and c. 3, X, 3, 11. And cap. Romana (?) X, 5, 39. And Cod. 6, 58, 14.

Exod. 23.

Ezek. 18.

Deut. 24.

[4] Nevertheless there are admitted to be occasions on which punishment may, advisedly, be inflicted even though there is no fault. This underlies the rule given in Exodus: "If an animal kills a man, let it be stoned," and the laws of Draco, the Athenian law-giver, contained a similar provision. On the same principle, "if a woman approach unto any beast and lie down thereto" the beast, though void of reason and therefore incapable of guilt, is ordered to be killed with her, lest the beast so grossly contaminated cause the vile deed to be remembered. Moreover God took away the life of the son born to David out of illicit intercourse on account of the father's sin, and the young people of Sodom were consumed by fire together with their elders, without having themselves committed any sin. Hence God himself says, "I am a jealous God, visiting the sins of the fathers upon the children, unto the third and fourth generation."

c. 5, X, 2, 6 (§ si vero), and c. 6, Dist. 22 and the glossators thereon. And c. 23 X, 5, 33. And c. 10 (clauses 1 and 2), X, 5, 7. Gloss on c. 2, X, 1, 2. And there is a leading text in c. 11, C. 1, qu. 4.

Ch. 21.

Lev., ch. 20.

c. 4, C. 15, qu. 1

2 Sam., ch. 12:

Genes., ch. 19

Exod., ch. 20.

[5] Now, although man ought not to imitate these divine judgments save so far as they go on unmistakable grounds, and although, accordingly, no law on any ground whatever ought to inflict bodily punishment for another person's offense (and that is why Covarruvias reprobated the pronouncement made by the emperors Arcadius and Honorius to the effect that, in their imperial leniency and indulgence, they had spared the lives of the children of those guilty of treason; for they had no right to kill them), yet there are circumstances in which human law may inflict even on the innocent such punishments as fine, public sale of property, and so forth, on general grounds of public expediency and in order the more effectually to deter people from wrongdoing; and this is provided for in different places in the laws and canons, especially in the case of the sons and grandsons of those who have been guilty of treason against either the divine or human law, who are to be branded with *infamia* and with confiscation of their goods. Cicero says that the law is quite clear on this point. The reason of this was to make parents better citizens through their love for their children. These views of St. Augustine and others are set out in full and discussed by Covarruvias.

St. Aug., q. 8 on Joshua. Thom., Card. and others mentioned by Covarruvias, bk. 2, variar. resolut. c. 8.

Variar. resolut., bk. 2, ch. 8.

In Cod. 9, 8, 5.

As in Cod. 9, 8, 5 and the like.

Epist. to Brutus.

Variar. resolut. bk. 2, ch. 8.

[6] Whence (if I err not) it is clear that hostage-taking of this description is lawful, as is deduced by common consent from St. Augustine—not, however, to the bodily harm of the innocent, who are not chargeable with any wrong-doing, but restricted to goods. For just as any one by mere consent can render himself liable to loss of goods, but not to hurt of limb or body, so also the laws and statutes, to which every one's consent is implied, can deal out punishment in proper circumstances even where there is no fault, provided it be pecuniary and not corporal.

Q. 10 on Joshua. c. 2, C. 23, qu. 2 and c. 1, bk. 2, tit. 11 in vi: and thereon Anch., Dom. and Franc., Jac. de Camb. Bartolus on reprisals, 33. Sal. on Authentica, Omnino, Cod. 4, 12, 4 (Nov. 52, 1). And c. 16, X, 2, 23. Jacob de Bellou on Nov. 52.

Joan. Papon., in Arrest., 5, 3, 2.

Dig. 9, 2, 13. c. 36, X, 5, 39. Notable gloss on c. 19, c. 23, qu 5. A neat gloss on rubric Cod. 10, 47, which gloss commentators follow in various places, and which is commended by Baldus on Cod. 4, 13, by Alex. on Dig. 42, 1, 63, num., 10, by Angel. and Jas. on Instit. 4, 6, 10, num. 68.

[7, 8] And so the rebuke which St. Ambrose administered to the Emperor Theodosius was a very just one, when that Emperor ordered the promiscuous killing of the populace because a soldier had been killed in some disturbance. The Emperor (said he) was entitled to inflict capital punishment on the killers of the soldier, but it was unjust to order the death of innocent persons, even on the ground of the disturbance. The Emperor accordingly confessed his guilt with tears and did public penance in the sight of the whole Church and he issued a decree that if ever the Emperor should pronounce too severe a sentence in anger, the execution thereof was to be suspended for thirty days.

c. 69, C. 11, qu. 3. St. Aug., Kingdom of God, bk. 5, ch. 26.

Cod. 9, 47, 20 and c. 69, C. 11, qu. 3.

[9] Further, just as intentional killing of innocent persons, for example, women and children, is not allowable in war (if unintentional, as when a town is assaulted with catapults and other engines of war, the case is different, because such things are inevitable in war), so also in this hostage-taking, although it is not allowable to inflict bodily hurt on the innocent, but only to confiscate their property, yet it may be that they are unintentionally killed without any liability arising, provided that the hostage-taking could not otherwise be carried out.

[10] Hostage-taking, it must be noted, is not lawful save in circumstances and conditions in which war would have been held lawful alike by divine and natural and civil law. And so the authority of a sovereign possessing power to declare war is required, nor has a judge competence to authorize it, nor may it be resorted to between citizen and citizen. Although it was lawful in Athens of old to resort to androlepsy on private initiative, yet fines were fixed for improper exercise of it (as Budæus has noted, on the authority of Pollux). Accordingly, it is a practice which even to-day must be submitted to for just cause, that is to say, on the ground that the country against which it is allowed has neglected to take proceedings against certain of its citizens for a wrong done by them. In other circumstances, where there is no true and just cause, a grant of hostage-taking will be inoperative.

c. 2, C. 23, qu. 2.

Novels 134 and 52.

Dig. 48, 19, 16, 8.

Dig. 40, 5, 26, 7; and 43, 4, 1, 5.

Chapter V.

Of Capture in War and the Law of Postliminy.

1. Things captured in just war belong to the captors.
2. The opinion of Alciatus rejected, that all present-day wars are civil wars.
3. Difference between movables and immovables as regards capture in war.
4. All booty is at the discretion of the general, not of the troops.
5. Generals sometimes send their booty to the treasury.
6. They sometimes divide it among the troops.
7. Part of the booty may be due even to persons not present at the battle.
8. Sometimes the booty is granted to the troops by proclamation and left to their discretion.
9. A share of booty due to the prince and to the general.
10. The Roman custom of dedicating part of booty to the Gods.
11. No taking of booty unless the enemy has been completely conquered, nor before due signal given.
12. Punishment to be visited on one who divides the booty fraudulently.
13. No share in the booty due to a soldier who has fled.
14. Soldiers ordered to sell their booty, so as not to overload the baggage trains.
15. *Res sacrae* may not be taken as booty.
16. Whether slavery is a natural or a human institution.
17. Enslavement does not destroy natural liberty.
18. No force (being merely matter of fact) sets up slavery (which is matter of law).
19. Those taken prisoners of war by Christians nowadays are not made slaves, save in a war with infidels.
20. A prisoner of war who returns home recovers his former liberty:
21. Unless he has sworn to return to his captors.
22. A deserter has no postliminy, unless he be a slave.
23. Those who surrendered have no right of postliminy, because taken with arms in their hands.
24. The ancient controversy about Mancinus.
25. Even women and children may be made prisoners of war.
26. A prisoner in a just war must pay such ransom price as he has promised.
27. To whom prisoners of war belong.
28. A prisoner of war may not be killed upon private authority.
29. The ransom price not to be increased after it has once been agreed on.
30. The remedies open to one who has paid for a prisoner's ransom.
31. Ransom of prisoners treated with favor.
32. Neglect of duty to ransom a prisoner.
33. Retaken land is within the law of postliminy.
34. Other things which may also be within it.
35. Whether things captured by the enemy and retaken from him vest in their former owner.
36. Property which the enemy has acquired is not transferable [*in commercio*] unless of a kind which is susceptible of postliminy.
37. When booty becomes the enemy's property.
38. Things captured by pirates do not become their property and, therefore, if retaken, must be restored to their former owner:
39. Though this is otherwise ordained by the laws of the Kingdom of Spain.
40. Whether stolen property which has been captured in war ought to be restored to the original owner.
41. Whether *res incorporales* can be captured in war.
42. Dispute between the Thebans and Thessalians.
43. A juristic whole [*universitas*] is not destroyed so long as one constituent part survives.

Offic., bk. 1. The first business of justice, says Cicero, is to see that no one hurts another save under the pressure of some wrong done to him; and this is
Ch. 2, above. the underlying cause of just wars, as we have shown above at some length.
Bk. 6, ch. 18. But this saying of Cicero's is, however, repudiated by Lactantius, who

says that it is spoiled by the addition of the final member. The phrase "save etc." ought (says he) to have been left out in accordance with the teaching of Socrates to the effect that revenge, like all infliction of evil, is injustice. Nevertheless it is a safe statement that a sovereign prince who goes to war because of wrong done to him is entirely unblamable, when he is prompted, not by diseased pride, but by love of justice, and when his object is the restraint of a wicked enemy and the defense of his own people. For, as Seneca puts it, no wrong is done to you if you are yourself made to endure what you were the first to do to others.

[1] That is the basis of the rule whereby what we capture in a just war becomes our property; and this is a lawful mode of acquisition (*justus modus acquirendi dominii*), as Cicero indicates in the passage where he says, "Nothing is private property by its nature; but things become private property either by long enjoyment on the part of the first occupant; or by victory, as when acquired in war; or by statute or covenant or stipulation or partition." This principle is obtained from the law of nations (*jus gentium*) and is approved by the divine, the canon, and the civil law. And the reason of this rule is to be found not so much in the satisfaction given to the wronged party as in the restraint imposed on those who wage unjust wars, as St. Augustine remarks in the passage quoted in the preface hereto.

Instit. 2, 1, 17.

Offic., bk. 1.

Dig. 1, 1, 5. c. 9, Dist. 1. Instit. 2, 1, 17. Dig. 49, 15, 28. Dig. 41, 1: 5(7) and 51.

1 Sam., c. 30. c. 9, Dist. 1 and c. 10 Dist. 1 and c. 25, C. 23, qu. 5 and c. 29, X, 2, 24.

[2] I do not agree with Alciatus in his attempt to show that in a war between Christians things captured do not become the property of the captors. His argument is as follows: All persons in the Roman world became Roman citizens by the enactment of Caracalla; at the present day Christendom is the Roman world; all Christians are brothers by the law of Christ; wars occurring between them are more like civil wars; therefore, that rule of war whereby things captured become the property of the captors does not apply between Christians.

On Dig. 50, 16, 118.

Dig. 1, 5, 17.

c. 24, C. 11, qu. 3.

Dig. 49, 15, 21, 1.

Why, if that were so, there could not be a just war between Christians, but its falsity is clear enough from what we have said elsewhere. So things captured even in this kind of war will become the property of the captors, save that a very ancient custom prevails among Christians whereby persons captured at any time in a just war do not lose their liberty. We shall shortly deal with this exception.

It is impossible to describe a war between two sovereign princes or two free peoples as a civil war, for those are not fellow citizens who do not owe the same fealty and obedience; but even when the war is against rebellious subjects and citizens, the laws of war whereby we acquire ownership of things captured from the enemy are not straightway inoperative, for persons who embark on treasonable schemes against the imperial majesty cease to be citizens and become enemies. Cicero accordingly asserts with abundant argument that the war waged against Antony, an enemy of the State, was a just one, while on Antony's side the war was

Bodin. Method. Hist., ch. 6, generally.

Dig. 49, 15: 26 and 19(8); and 4, 5, 5, 1.

unjust, and so, the laws of war which only apply to enemies did not apply
Philipp. 8. in his favor—a topic discussed by us at length elsewhere, and what we then said can be imported here. On just war, above, ch. 2

[3] Again, it is indisputable that the ownership of things captured in a just war is transferred to the conqueror, but this is subject to a distinction between movables and immovables; for immovables, e. g., land, Dig. 49, 15, 20, 1. become public property—although we read that on more than one occasion, in days gone by, land taken in war was divided among the soldiery as a reward for strenuous exertions, and this was so ordained by Romulus. Dig. 41, 1, 16; and 6, 1, 15, 2. Dion. Hal., Rom. antiq., bk. 2. And Alexander Severus made grants of land, taken from the enemy, to the border lords and soldiery, to belong to them provided that their heirs also were soldiers and never to devolve on civilians, for he thought that they would be all the keener soldiers if the rights which they defended were their own. Ælius Lampr., in Life of Alex. Sev. Seeing, however, that these lands are acquired for the prince and not for the soldiery, it will be left in the discretion of the prince to say how they are to be treated.

And according to the constitutions of the kingdom of Spain not only land but also any ships of war which are captured in a naval war are acquired for the king. Span. Ordin., bk. 19, tit. 26, par. 2. But as regards movable booty of every other description, it was not customary to assign it to the soldiery nor had the general any right in it, but it was the quæstor's duty to sell it and to pay the price into the treasury. Bk. 7. And Dionysius of Halicarnassus tells us that there was a statute to that effect and that it was because he had violated this law in dividing among the soldiers the booty taken from the Volscians, more than for any other reason, that Marcius Coriolanus was condemned by the people. And that is the point, too, of St. Ambrose's remark, that it is an injunction of military discipline to deliver up to the king everything that is preserved, following the example of Abraham, who made over all his spoil to the king of Sodom. c. 25, C. 23, qu. 5.

Cod. 8, 53, 36. [4] It is clear, however, that in later times at Rome all booty was at the disposal of the general and that is abundantly shown by several passages in Livy. Thus he tells us how the Phocæans opened their gates and surrendered themselves to the Romans, on the faith of an undertaking that they should receive no hostile treatment; nevertheless the soldiery went off in different directions for the purpose of sacking the city; thereupon Lucius Æmilius withstood and called the soldiers back saying that it was captured towns and not surrendered towns that could be sacked, and declared that these matters are under the control of the general, not the soldiers. Livy, bk. 37.

Elsewhere Livy describes how Camillus sought the advice of the Senate at the time of his siege of Veii. He saw that victory was within his grasp and that, consequent on the capture of so rich a place, there would be more booty than in all other wars put together. Now he shrank from incurring either the anger of the soldiers, should he be nig-

gardly in his division of the booty, or the jealousy of the Senators, should his division be too generous; so he referred the matter to the Senate.

Livy, bk. 5.

[5] Now commanders sometimes send the whole or a portion of the booty to the treasury through the quæstors. Thus Lucius Furius, prætor, when celebrating his triumph over the Gauls, brought into the treasury 320,000 pounds of copper and 170,000 pounds of silver. Marcus Helvius and Quintus Minucius, too, brought into the treasury an enormous mass of silver and gold out of their Spanish booty; so did Titus Quinctius, after the overthrow of Philip; and so, to a much greater amount than the rest, did Lucius Æmilius Paulus, after the overthrow of Perseus. And Camillus, the general who scattered the Falisci, and took their camp, turned over the whole of his booty to the quæstors, thereby rousing no small anger in his soldiers, who, overborne by the severity of their commander, both detested and marvelled at this virtue (in Livy's words) : and in different passages of Livy the account may be found of the payment into the treasury of large sums of silver and gold, being booty taken from the enemy.

Cic., Epist. 27.
Livy, bk. 31.
Livy, bk. 34.
Livy, bk. 45.
Bk. 6.

[6] Sometimes commanders sell the booty and divide the price among the soldiers, with a preference in favor of those whose bravery in the war had been the most conspicuous and with due regard to the rank and dignity of each participant. Thus Julius Cæsar promised in Gaul to give by way of booty to each soldier 200 sesterces in return for their toil and endurance (for they were indefatigably constant in toil in wintry days, on most arduous marches, and under intolerable cold) and 2000 sesterces to each centurion. And out of the booty taken by Lucius Æmilius Paulus, on the overthrow of Perseus, each foot-soldier received 100 denarii, and each centurion twice, and each horse-soldier thrice that amount.

A. Her., on Gallic war, bk. 8.
Livy, bk. 45.

Marcus Valerius Corvinus, after his defeat of the Samnites, and Caius Junius, after the capture of Bovianum, gave all the booty to the army. So did the Senate in the case of the booty taken from the towns of Epirus which had defected to Perseus. And so (says Livy) after the word had been given to sack the towns, the booty was so vast that each horse-soldier received 400 denarii as his share and each foot-soldier 200. And such division of the spoil is held lawful.

Livy, bks. 7 and 9.
Bk. 45.
c. 10, Dist. 1.

It is recorded in Holy Scripture, too, how the Lord commanded Moses that he and Eleazar should take " the sum of the prey that was taken " from the Midianites whom the Israelites had conquered and should divide it equally " between them that took the war upon them " and that a fiftieth part should be given to the Levites " which keep the charge of the tabernacle of the Lord."

Cod. 8, 53, 36. Bartolus on Dig. 49, 15, 28. Sp. Ordin., bk. 1, 17, 19 and 20, tit. 26, par. 2.
Num. 31.

[7] And after David had beaten Amalek in battle, he gathered together all the spoil, and they who had been present in the battle claimed that it should be divided among themselves alone without anything going

to those who had not been with them there, but David said that they should share equally, both those that went down to the battle and those that tarried by the stuff; and from that day forward that was a statute and ordinance for Israel. The same ruling occurs in the constitutions of the Kingdom of Spain. This is also the explanation of the conduct of Caius Fabius Ambustus, military tribune: At the time when he marched to the storm of Anxur, his colleagues, Cnæus Cornelius Cossus and Valerius Potitus, had gone with a part of the army on a ravaging expedition in order to draw off the Volscians; so after he had captured the town he kept his troops back from plundering it, until the arrival of his colleagues and their troops, for he said with emphasis that they too had taken Anxur, in that they had prevented the rest of the Volscians from aiding in its defense.

1 Sam., c. 30.
Span. Ordin., bk. 25, tit. 26, par. 2.
Livy, bk. 4.

[8] Lastly, commanders sometimes rouse the zeal of their men by decreeing the whole booty to them before an engagement, each man being allowed to keep whatever the fortune of battle has put in his way; this is what the Senate decided with regard to the booty of Veii, in accordance with the opinion of Publius Licinius, to the effect that it would be more agreeable and pleasurable for each to take home with him what he had seized from the enemy with his own hand than to obtain many times as much on the award of another: this decree was made, however, with the dissent of Appius Claudius, who blamed the liberality as novel, lavish, inequitable, and ill-advised. So far, then, regarding the things which are acquired in actual fighting: it is otherwise with regard to enemy property which comes into one's hands apart from any struggle; this becomes his who first obtains possession of it.

Livy, bk. 5.
Dig. 41, 1, 51; and 41, 2, 1, pr.

[9] Again, even when booty is granted to the soldiery, the prince is none the less entitled to his share. By the constitutions of the Kingdom of Spain this share is one-fifth, at times one-third, and at other times one-half; the same constitutions give one-seventh to the general, at times one-tenth. But if it chance that in a naval war the king supplies the ships and their armament and also provides supplies and wages for the soldiers and sailors, the same constitutions place the whole booty at the disposal not of the general or admiral but of the king, nor will the soldiers or sailors get any part thereof, except such as is granted to them by the king's liberality. In every other event, however, after the king's share has been set aside, the admiral can divide the residue between the soldiers and sailors, a seventh part of that residue being due to him himself.

c. 10, Dist. 1.
Span. Ordin., bk. 4, tit. 26, par. 2
Span. Ordin., bk. 20, same tit.
Bk. 19, tit. 26, par. 2.
Span. Ordin., bk. 14, tit. aforesaid.
Span. Ordin., bk. 29, tit. aforesaid
Span. Ordin., bk. 30, tit. aforesaid.

[10] Furthermore, the Romans were wont to secure victory by vowing a portion of the spoils to their gods; and so Camillus, at the outset of his attempt to destroy the town of Veii, vowed a tithe of his spoil to Delphic Apollo.

Livy, bk. 5.

[11] And we must not omit to call attention to the rule of military discipline which forbade, under the severest penalties, the quest of booty

save after the enemy had been routed and his camp taken and his fortress or town completely reduced to submission, and not even then unless the commander had given the signal, notwithstanding that before the battle he had proclaimed that the booty should belong to the soldiers. The object of this rule was to prevent the greed of booty giving the enemy (as often happens) a chance to slip out of one's hands or to renew the engagement. This actually happened in the case of the Samnites. They had fought with the Romans on equal terms far into the night and at last were led by the greed of booty to make an attack on the Roman baggage-trains (which were stationed at some distance from the fighting force without a guard or defense); but they were scattered by Marcus Fabius, the master of the horse, acting under the orders of Cornelius Arinna, the dictator, and owing to their being encumbered with baggage they were miserably slain, yielding up the victory to the Romans. Livy, bk. 8.

Besides, the common experience is, as Appius Claudius used to say, that the more backward the looter is kept, the more forward is every one wont to be in taking his share of toil and danger. And so at the taking of Veii, though the Senate had granted the spoil to the army, yet the quest of the booty was not allowed until the dictator, Camillus, had given his permission. It was just the same with the booty of the towns of Livy, bk. 5. Epirus, which had defected to Perseus. The Senate had given it to the army, but the signal for sacking the cities had to be waited for. And at Livy, bk. 45. the storming of Nova Carthago, when at last the fortress fell and the signal had been given, then the victors directed themselves towards the booty. And, accordingly, the provision in the constitutions of the King- Livy, bk. 26. dom of Spain is a very proper one, that any one who goes after booty before the enemy has been completely routed loses his share of the booty and has to pay a fine of double that amount and is put to a worse form of military service. And indeed if, through the fault of looters, the enemy are enabled to renew the fight and thus conquer or slay the king, these looters meet with the same punishment as if they were themselves directly guilty of those things. Span. Ordin., bks. 2, 3, 19, tit. 20, par. 2.

[12] He, again, who commits fraud in division of booty is by the same constitution subjected, by way of punishment, to a fine of double the amount and to loss of his share. But he who pilfers booty taken from the enemy is within the law against peculation and liable to a four-fold penalty, according to a response of Modestinus. Dig. 48, 13, 15.

[13] Those, however, who have fled from battle or have been cowardly or slack, have no claim to a share of booty. Baldus on Cod. 8, 53. 36 and Dig. 49, 16, 6, 3. Span. Ordin., bk 1, and bk. 20, tit. 26, par. 2.

Accordingly when Lucius Quinctius Cincinnatus, the dictator, freed Lucius Minucius and his army from the besieging Æqui and captured the enemy's camp (which was fitted out with everything needful) he gave the whole of the booty to his own force only and upbraided both the army of the consul and the consul himself in these terms:

"You, my men, will have to do without any of the spoil of that enemy whose spoil you were so near becoming; and you, Lucius Minucius, until you begin to have a consul's courage, it will be as my legate that
Livy, bk. 3. you shall command these legions."

[14] Now, seeing that nothing irks or weakens an army more than a mass of baggage, it will be very conducive to military discipline to order the soldiers to sell all their booty: Publius Decius gave an example of this when, after storming several towns in Samnium, he forced his soldiers to sell all their booty at the first opportunity, so as not to burden
Livy, bk. 11. the marching column with heavy baggage.

[15] Be it remarked that *res sacræ* are not liable to be seized as booty: for, as they are no one's property [*res nullius*], they can not be said to belong to the enemy and it is only enemy property that is capturable as booty; and that which is *divini juris* (as the emperor says) is not
Instit. 2, 1, 7 and Dig. 1, 8, 1. the property of any individual and is not subject to the power of man. And so he who lays forcible hands thereon will be punished under the *Lex Julia* for sacrilege according to his rank and to the character of
Dig. 48, 13, 11. the thing. Wherefore, after the destruction of Carthage (which was accompanied by a grant of booty to the soldiery), Scipio distributed a large number of rewards and gifts among the soldiers, but he excluded
Appian, Punic war. those who had looted and had violated the shrine of Apollo.

Now there was a controversy in olden days whether it was sacrilege to take a privately owned article which had been deposited in a
Quintil., Inst. orat. bk. 7, ch. 4. Cicero, Invent., bk. 2. temple: the emperors Antoninus and Severus, however, declared in a rescript that the action on theft would be given and not the action on
Dig. 48, 13, 6. sacrilege and therefore the article in question must be held seizable as
Bk. 2. booty. But Cicero in his *De Legibus* draws no distinction between an article which is *sacer* (holy) and one which is intrusted to a place which
c. 21, C. 17, qu. 4. is *sacer*. And our canons take the same view. Now, however true this may be as between citizen and citizen, I do not think it holds good in the case before us. An article intrusted to a place which is *sacer* can not be taken to become *sacer* itself, for this involves its being a *res nullius* (i. e.
Instit. 2, 1, 7. no one's property). As, therefore, the article in question is not a *res nullius*, but belongs to a private person, and he an enemy, I hold that it may be seized as booty. In order that this may be so, it is enough for it
Dig. 41, 1: 5 at end and 51. to be an enemy's.

Again: our remarks about things captured in a just war apply also to free persons so captured. This is a doctrine both of the law of nations (*jus gentium*) and of the civil law; they become the slaves of their
Dig. 49, 15, 24 and the whole title. captors and are no longer persons but things subject to ownership. This
Dig. 1, 1, 5. Instit. 1, 2, 1. is the origin of slavery.

[16] There is in truth an old-standing discussion among philosophers, whether this division of persons into freemen and slaves is a feature of our society which is of natural origin or of human institution:

Aristotle's view was that it was of natural origin, but our jurists affirm that slavery is against nature and belongs to the law of nations (*jus gentium*), seeing that by natural law all were born free in the beginning and that by nature all men are equal, a proposition which is approved also by Cicero, for (says he) no two things are so identical, so similar to one another, as we men are to each other. The doctrine of the jurists is not, however, free from difficulty, because the law of nature is immutable and the *jus gentium* can not derogate from it. Moreover it seems unjust and repugnant to nature for men to be slaves to men, though possibly expedient in the interests of the State, an argument on which some ancient thinkers relied very much in days gone by when attempting to defend the commonly stated proposition that a State can neither exist nor develop without injustice. And Cicero represents Philo as carrying on a discussion of these matters and as receiving an excellent and final reply from Lælius, referred to in the preface hereto where we showed that the reduction to slavery of prisoners of war is not unjust.

Polit., bk. 1, ch. 1. Instit. 1, 3, 2 and 1, 2, 2 (latter half). Dig. 50, 17, 32. Instit. 1, 2, 2, at end. In Republic.

Note also, as aiding in the solution of the problem, that liberty is an institution of the law of nature, in that before the development of the *jus gentium* all men were born free and were reckoned each other's peers and equals—not, however, that the law of nature has any precept on the subject or that it forbids slavery. But the *jus gentium*, which has its basis in natural reason, introduced war and slavery. For, as man's wickedness increased, right natural reason—and there is nothing diviner than it; it is in virtue of it that we are superior to the beasts—taught that this wickedness of man ought to be restrained by war and captivity and slavery.

Dig. 1, 1, 4. Dig. 50, 17, 2. Thom. Aquin. 1. 2. qu. 94. Art. 5. Dig. 41, 2: 3, 5 and 7. Instit. 1, 2, 2, latter half. Praep., c. 9, Dist. 1. c. 8, Dist. 35.

In the same way, under the law of nature, in that primitive time which pagans used to call the Golden Age, all things were in common and nothing belonged to any individual, but in following ages it was found that community of goods was not adapted to man's debased nature and so the *jus gentium*, under the guidance of natural reason, developed the system of private ownership and all the differences incidental to it. Community of goods, therefore, equality of men, one and the same freedom for all—these suit the blameless primitive time and Plato's ideal republic far better than they suit the iron age. They are therefore condemned by the *jus gentium*. Slavery, then, was unknown to the law natural—according to which all men were born free and reckoned each other's peers and equals; yet it was left open to the *jus gentium* to develop slavery and to introduce the doctrine that prisoners captured in a just war become slaves—and this all the more so because of its utility to the State as a means of repressing those who wage unjust war. That same reason, accordingly, which permits war enjoined the introduction of slavery. And to this effect are the following remarkable words of St. Augustine:

Dig. 1, 1, 5. Dig. 1, 1, 4; and 50, 17, 2. Kingdom of God, bk. 19, ch. 15

"Justly was the burden of servitude laid upon the back of transgression. So that it was guilt and not nature that gave its origin unto that name."

And then he adds:

"But take a man as God created him at first, and so he is neither slave to man nor to sin. But penal servitude had its institution from that law which commands the conservation and forbids the disturbance of nature's order; for, if that law had not first been transgressed, penal servitude had never been enjoined."

Consistent herewith is the apostolic injunction to servants to be obedient to their masters and to do their service with good-will; and Canaan was for his sin declared a slave by his father Noah and made a servant of servants unto his brethren. The same apostle, however, recommends masters not to insist too strongly on their rights and in certain matters he declares that all men are on an equality.

Ephes., ch. 6. 1 Tim., ch. 6. Tit., ch. 2. Coloss., ch. 3.
Genes., ch. 9.
Gal., ch. 5. Ephes., last ch. Coloss., ch. 4.

[17] It must also be borne in mind that the freedom which this enslaving of persons does away with is not that natural freedom which consists in action (for a slave, however much his master may order, may refuse to enter on an inheritance), but that which results from certain matters of law and is an institution of the *jus gentium*.

Cod. 6, 24, 3.
Dig. 1, 1, 4. Instit. 1, 2, 1. Dig. 48, 19, 17.

[18] No mere force, which is matter of fact, can create slavery, which is matter of law. For captives other than those made so in just war do not become slaves—not those made by brigands or robbers or by those who are not "just" enemies.

Dig. 49, 15: 19, 2; and 24; and 32, 1, pr.; and 28, 1, 13.

[19] And indeed there has grown up in the Christian world a laudable and long-established custom that the prisoners on either side, however just the war, are not enslaved, but they are kept with their freedom intact until payment of ransom (Greek λύτρον). Romulus, in truth, with intent to add to the size of his State and to make it big instead of little, forbade the slaughter and even the sale of prisoners taken in war, and he settled Roman colonists on portions of the enemy soil and gave to many conquered peoples the rights of citizenship.

Boerius, Decis. 178. Baldus on Dig. 49, 15, 24. Alciat. on Dig. 50, 16, 118. Span. Ordin., bk. 1, tit. 29, par. 2.
Dion. Hal., Rom. antiq., bk. 2.

If, however, any Christians fight on the side of Saracens and infidels against fellow-Christians, or render them any aid whatever, then, should they be taken prisoners, they will be enslaved and they are by the fact itself excommunicate, for by that time they are no longer to be classed among Christians, but among the infidels, to whom they have allied themselves. They may not, however, be sold to others than Christians. But if the war be with infidels and pagans, then indeed the condition of the prisoners taken on each side will be that which is fixed by the civil law for prisoners taken by the enemy. This is decided by the constitutions of the Kingdom of Spain. And so the fictions of the *Lex Cornelia* and of postliminy will be in operation. Now how inexpedient and charged with danger to the State it is to increase the number of slaves,

c. 6 and c. 17, X, 5, 6. Span. Ordin., bk 4, tit 21, p. 4 and bk 9, tit. 29, part 2. Leading text in Dig. 48, 8, 3, 6; and 49, 16, 7; and 41, 1, 51.
Span. Ordin., bk. 9. Cod. 1, 10 (?).
Alciat. on Dig. 50, 16, 118. Claud. Cant. on Instit. 2, 1, 17. Covar. on c. 6, Reg. jur., in vi, 2 par. relect. §11.
Span. Ordin., bk. 2, tit. 21, par. 2.

is shown by the frequent servile wars and plots which at different times vexed the Roman State and led to the bitterest conflicts. Bodin demonstrates this at length. Repub., bk.1, ch. 5.

[20] Further, suppose that free persons, who have been made prisoners of war and reduced to slavery, succeed in returning to their own country—whatever may be the manner in which they have got out of the enemy's hands, they regain their original liberty, just in the same way that wild animals cease to belong to their captor if they make good their escape from him. Dig. 49, 15, 26. Instit. 2, 1, 12. Dig. 41, 1, 5.

[21] Further, captives who have returned from the enemy reacquire every right which they had forfeited by their captivity: and this is owing to the law of postliminy; but that is not the case if they have given their parole to return to the enemy or not to depart from him, for those who have returned to their own country in such circumstances can not be said to have returned by postliminy, as was held in the case of Attilius Regulus and those whom Hannibal sent to the Senate after the defeat of Cannæ under an oath to return to his camp if they failed to obtain ransom. For it is not enough to have returned to your country *corpore* (i. e. physically) unless you do so also *animo* (i. e. with intent to remain there), and so in the case of those who only came home with an intent to return to the enemy there was no postliminy. Dig. 49, 15, 19, pr. Dig. 49, 15, 5, 3. Span. Ordin., bk. 9, tit. 29, par. 2. Cic., Offic., bk. 3. Dig. 49, 15, 26.

[22] A deserter also has no rights of postliminy, for (to quote Paulus) one who has abandoned his fatherland with the foul plan and intent of a traitor, must be deemed an enemy, and this is so alike in the case of female or male, of *filiusfamilias* or *paterfamilias*. Accordingly a paterfamilias did not by postliminy regain a son who had deserted, because the father had lost him (again to quote Paulus) in the same way as the State did and because military discipline was esteemed a greater thing by Roman parents than their love for their children. The case is different with a slave deserter, for the master has rights by postliminy over him, since a rule to the opposite effect would not so much be injurious to the slave as hurtful to the master. Dig. 49, 15, 19, 4. Dig. 49, 15, 19. Dig. 49, 15, 19, 4.

[23] It must be remarked that postliminy may apply to all, whatever their sex, age, or rank, but, in order that it may apply in the case of soldiers, they must prove that they were captured fighting, there being no postliminy in the case of those who surrendered to the enemy after defeat and with arms in their hands. For the Romans deemed it most shameful to fall into the power of the enemy by surrender and not by superior force. The Senate, accordingly, refused (though they had the opportunity) to ransom the 8,000 Romans who had surrendered to Hannibal after the defeat of Cannæ but who had been captured in the camp where they had been left and not in the fighting line—the intent being to implant in the Roman soldier that he must either conquer or die. We shall have more to say on this topic later. Dig. 49, 15, 19, at end. Dig. 49, 16, 5, 6. Dig. 49, 15, 19. Span. Ordin., bk. 9, tit. 29, par. 2. Livy, bk. 22. Cic., Offic., bk. 33. Bk. iii, ch. 15, post.

A soldier who has been made prisoner and who returns with postliminy can not, however, claim pay and largess for the time of his captivity. The Emperor Antoninus ruled this in a rescript. If, however, he be captured by the enemy after the completion of his period of military service and then return, he is entitled to his veteran's rights and pension, according to a response of Arrius Menander. There was a difference of opinion between Brutus and Scævola on the question whether those reacquire their former status who return home after having been surrendered to the enemy by the fecials, pursuant to a decree of the Senate or an ordinance of the people.

Cod. 12, 35, 1.
Dig. 49, 16: 3(10), and 5.

[24] This was the issue in the celebrated case of Mancinus. He had made peace with Numantium in improper fashion; the Senate decreed his surrender to the enemy; they would not accept him. A question then arose whether he continued to be a Roman citizen, there being some who thought he did not. Thereupon a tribune of the plebs, Publius Rutilius, the son of Marcus, ordered his expulsion from the Senate-house, into which he had not scrupled to enter after his return. Rutilius did this on the ground that he was no longer a citizen, it being a matter of long tradition that there was no postliminy for one whom either his father or the people had sold or whom the *paterpatratus* had surrendered. And it was taken to be immaterial that the enemy had refused to receive Mancinus, he ceasing to be a Roman citizen whom the State has repudiated, whether the enemy has accepted him or no, just as in the case of one interdicted of fire and water, or proclaimed an enemy, or deported to an island. And this seems to be supported by the dictum of Marcellus that a prisoner of war who returns is not a citizen unless received as such by his fellow citizens.

Cic., Orator, bk. 1.
By inference, Dig. 41, 2: 1(4) and 18(1).
Dig. 4, 5, 5, 1.
Instit. 1, 16, pr.
Dig. 49, 15, 4.

There was, however, a party that held that, as Mancinus had not been accepted by the enemy, he remained a citizen. This view was approved by Cicero, on the ground that a person is not surrendered who is not accepted, surrender being like donation and requiring acceptance. We read in Pomponius, however, that by subsequent statute Mancinus was declared a Roman citizen. This seems to show the soundness of the opinion of Modestinus, that one whom the enemy would not accept does not on return become a citizen unless received as such, for otherwise what need would there have been for any statute about Mancinus?

Topic. and pro Caecina, at end.
Dig. 39, 5, 10 and Cod. 8, 53, 6 and Dig. 41, 2, 34.
Dig. 50, 7, 18.

[25] Again, in war not only men but women also may be taken prisoners. Thus we read that the wife of Darius and his mother and his whole family were captured by Alexander; Sophonisba, the wife of Syphax, by Masanissa; and Cleopatra by Augustus. Scipio, however, won for himself throughout Spain a great reputation for clemency when, after the capture of Carthagena, he freely restored, unharmed, the lovely bride of Allucius, prince of the Celtiberians, who had fallen into his hands.

Cod. 8, 50: 1, 7, 8, 9 and 16.
Dig. 49, 15: 6 and 8.
Livy, bk. 26.

Nor are the young exempt from capture in war, although Camillus set a praiseworthy example in the case of the young nobles of Falisci. Their schoolmaster had craftily brought them into Camillus' camp. Camillus, however, did not take them, but stripped the traitor and turned him over, with his hands tied behind his back, to the youths to be beaten and led home, saying, " There is no alliance between us and the Falisci such as is made by human agreement, but there is and will be one of nature's making. There are laws of war just as there are laws of peace. We bear arms, not, however, against those who are so young as that they would be spared even on the storming of a town, but against warriors." This moderation so stirred the Falisci that they surrendered to the Romans of their own accord.

Dig. 48, 6, 28; and 49, 15: 10 (pr. and 11).

Livy, bk.

Of course, severity towards women and the young was always reckoned very disgraceful, their very sex and age exempting them from the hazards of battle and the rage of the conqueror. It is accordingly a precept of the divine law, given to the Jews, to slay all enemies who resisted and who would not make peace, but that the women and the little ones were to be taken as spoil and made slaves. The canons indeed contain an injunction that the following be spared: clergy, monks, converts, foreigners, merchants, and country folk, but this (says Panormitanus) has been abrogated by contrary usage. I do not think, however, that it has been abrogated as regards the clergy, upon whom it is forbidden to lay hands under penalty of anathema—unless indeed they take active part in the war, for he who misuses a privilege loses it.

Deut., ch. 20.

c. 2, X, 1, 34.

Ibid.

c. 29, C. 17, qu. 4.

c. 7, Dist. 74 and c. 14, X, 5, 19.

It deserves notice, too, that when war breaks out between two countries, those of the enemy who are found on the soil of either country may be made prisoners despite the fact that they came there in time of peace, and in olden days they would have been made slaves.

Dig. 49, 15, 12, pr.

[26] Now a prisoner made in just war who has promised a reasonable price for his ransom can not claim discharge from his obligation by alleging that he gave the promise under fear and duress, for the edict of the prætor, under which duress is a ground of rescission, does not apply to that kind of duress which is legally imposed. Besides, what we have here is not so much a case of promise of a price under duress as of release from the fear of justly imminent death by means of that promise; and this is especially so where the ransom-price has taken the place of slavery.

Leading text in Dig. 4, 2, 21 pr. Panormitan. on c. 2, X, 1, 40, col. 3, and c. 6, X, 1, 40. Felinus on c. 5, X, 2, 25, nu. 20. Domin. on c. 4, Dist. 5, last col. Sylvest., on word Metus, qu. 6.

rt. on Dig. 2, 14, 5; and 3, 5, 20.

[27] Now as regards the acquisition of ownership in prisoners of war, the same holds good as with other booty of things movable, i. e., it is subject to the discretion of the general, and Dionysius of Halicarnassus is a witness that this was the former practice, but it is more usual nowadays to grant prisoners of war (like other movables) to their actual captors, unless the ransom happen to exceed the sum of 10,000 crowns, as where the prisoner is a duke or count or baron or other person of note. By the long-standing practice of Spain and France and England these

Rom. antiq., bk. 5.

Bartol. and Bald. on Dig. 3, 5, 20. Joa. de Ana. on c. 21, X, 2, 1, in not. Beer. decis., 178. Span. Ordin., bk. 5 and 8, tit. 26, par. 2.

latter belong to the king, and the chance of ransom ought not to be denied them, not even when the prisoner is the commander-in-chief, unless further disturbance of the peace is apprehended as the result. For (in the language of St. Augustine) just as violence is the lot of those who fight and resist, so, after a victory, mercy is at once the prisoner's due. On this principle (says Cicero) our forefathers made the excellent rule that none should kill a king who had been made prisoner of war, because it would be improper to waste the opportunity which fortune has put in our way in the punishment of those who, but a little while before, owed a splendid position to the same fortune.

c. 3, C. 23, qu. 1, at end. Ibid.

Cic. to Herenn. bk. 4.

But there ought to be no respite for a man so capable that there would be a grave risk of his breathing new vigor into the war; that would be an unjust mercy, says St. Ambrose. And that was the point of view of Ferrandus the deacon, when he was writing to Count Reginus on the subject of the duty of a pious Christian general, for he included among the seven rules of innocence which he enjoined on generals, this: "Do not be over just." And so it was a practice among the Romans for a general when celebrating his victory with triumphal pomp to turn aside from the forum into the capitol and to order those prisoners of high rank, who had sown the seeds of discord and who were responsible for the war, to be cast into gaol and put to death at the close of the triumph.

Offic., bk. 1, and c. 33, C. 23, qu. 4.

Alexand. ab Alexand., Genial. dies, bk. 6, ch. 6.

[28] In other circumstances, however, it is not allowable for any private person on his own authority to kill a prisoner, nor to treat him with great severity, since it was not allowed, even in the olden days when prisoners of war were enslaved; for the civil law included among the limitations which it imposed on the power of a master this: that he was only allowed to kill his slave if he detected him in a deed for doing which a freeman might, if detected, have been killed; in other cases a master might not kill his slave, but only inflict on him a moderate degree of chastisement. And a rescript of the Emperor Antoninus protected slaves against excessive severity and intolerable cruelty on the part of their masters. There was a corresponding constitution of the Kingdom of Spain as regards prisoners taken on either side in a war between Christians (but not in a war between parties of differing religious professions).

Dig. 48, 5, 25; and 30, 53, 3.

Cod. 9, 14.

Dig. 1, 6, 2.

Span. Ordin., bk. 1, tit. 29, par. 2.

[29] Again, if a bargain about ransom has once been concluded between a prisoner of war and the person who holds him captive, the terms of the bargain can not subsequently be stiffened (say) on the ground that the latter has ascertained that the former is a person of such and such a family and wealthy, and any subsequent bargain will be invalid and the earlier one will be substituted for it. This is the principle on which the following response of Paulus is founded: "One ransoms a prisoner of war from the enemy and then transfers to a third person

Guid. Pap., qu. 113. Papon. in Arrest., 5, 6, pr.

for a greater sum the lien which he has over the person ransomed: the
person ransomed only owes the ransom-price and not the greater sum." Dig. 49, 15, 19, 9.

[30] He, moreover, who has paid or has undertaken to pay the
ransom price in order to procure freedom for a prisoner of war, not only
has the *actio negotiorum gestorum* (i. e. the action to recover money Dig. 3, 5, 20.
spent on another's business)—and this whether the captor was or was
not a "just" enemy—but he also has a lien over the ransomed person Leading text in Dig. 24, 1, 28. Covarruv. on
Cod. 8, 50: 2 and 17. until he be repaid, and he is not fettered by the interdict *de libero homino* c. 4, X, 4, 1, 2 par. c. 3, §4, nu. 14.
Dig. 30, 43, 9; and 28, 1, 20, 1; and 49, 16, 8. *exhibendo* (i. e. ordering production of the freeman); nor does the
person ransomed regain his original status until he has paid or tendered Dig. 43, 29, 3, 3. Cod. 8, 50, 17.
the amount of the ransom, but he does not become a slave nor did he in
the olden days when slavery existed in some places. And, as a privilege Cod. 8, 50, 2.
arising from his status of freeman, he will be able to assert his rights of
succession so that he may be able to pay out of the succession the price
that has been given for him; and his son has rights of succession to him, Cod. 8, 50, 15.
even if his death occur before he discharges himself; nay, by his death the
person ransomed is freed from his ransomer, the lien being (so to say)
determined and the result is that his heir and any surety are under no Dig. 49, 15, 15; and 38, 16, 1, 4.
obligation to pay the ransom-price. And although we admit that the
issue born of things which are subject to a charge is fettered by the same
obligation, yet the emperors declined to allow that issue born to a pris- Dig. 20, 1, 13.
oner after his ransom was subject to the lien. Cod. 8, 50, 8.

Now what has been said holds good of freemen captured by the
enemy and ransomed, but slaves captured by the enemy and ransomed
become the slaves of him who ransoms them; when, however, the price
which he has given is proffered to him they are taken to have returned or
been received back with postliminy. Dig. 49, 15, 7.

[31] Again, the ransoming of prisoners is viewed with such favor
that a gift towards this purpose, however big it may be, is irrevocable
and need not be registered; and although not even a soldier may make a Cod. 8, 53, 36.
bequest to an uncertain person, yet the emperors, upon duteous grounds Instit. 2, 20, 24.
and out of pity for the sufferings of prisoners, ruled that a legacy for the
ransom of prisoners—even of the whole of the testator's fortune—is Cod. 1, 3, 48.
valid despite the uncertainty of the persons. And when a prisoner has Cod. 1, 3, 28.
been ransomed upon duteous considerations, e. g., a son by his mother,
it is not seemly to discuss about claiming back the price, but a gift is pre-
sumed, and one who ransoms a maiden out of wantonness or who prosti- Cod. 8, 50, 17, 1. Span. Ordin., last bk.,
tutes her, loses the ransom-price and the maiden can escape from him tit. 29, par. 2.
without punishment. Cod. 8, 50, 7.

[32] Also neglect by a child to ransom his father is a good ground
for his exheredation, and, by a statute, instituted heirs who neglect to Authentica, Si captivi, Cod. I, 3, 49 (Nov.
ransom a prisoner lose their rights in that person's succession, and the 115, 3, 13). Span. Ordin., bk. 3, tit. 29,
succession goes to the Church to be devoted to the ransom of prisoners. par. 2.

We have stated that postliminy applies to prisoners whether free or slaves, and whether male or female; let us now consider the other things which return with postliminy, and when we have found out what these are we shall know what the things are to which postliminy is inapplicable.
Topic. For (as Cicero says) the force and characteristic of contraries that negative each other is this: that when one is found to be present the other is at once known to be absent, and when one is ascertained the other is
Text in Instit. 1, 8, pr. and Dig. 32, 103, 3 (?), and Bartol. thereon. ascertained also.

[33] Well, land and the usufruct thereof are other things which revest by postliminy. If an enemy has been driven away from land which he had taken, the former owners reacquire their ownership in it, and any usufruct which existed over it is set up afresh. Paulus has a
Dig. 49, 15, 20, 1; and 7, 4, 23; and 1, 8, 6 pr. c. 13, C. 16, 4 and gloss thereon. response to this effect, with which I fully agree. This doctrine holds good, no matter how great an interval of time has elapsed; and so when
And Cod. 3, 28, 16. the town of Saguntum, which had been in hostile occupation for over seven years, was at last retaken, it was restored to such of the former
Livy, bk. 24. inhabitants as had survived the stress of the war. And a constitution of the Kingdom of Spain provides that empires, kingdoms, earldoms, and other greater dominions revest by postliminy if they are recovered from an enemy and that a title to them can not be based on usucapion, not even reckoning from the day of their recovery; but other smaller dominions are subject to prescription if the owner does not appear for four years
Span. Ordin., bk. 10, tit. 29, par. 2. after their recovery, unless indeed he be a minor. The same constitutions enact that if any subject by his own fault loses a fortress, even his own, and the fortress is recaptured, it must be handed over to the king on his demand, even though the recapture was due to the exertions of
Span. Ordin., bk. 32, tit. 28, par. 2. the former owner.

[34] Lastly, large vessels and transports may revest by postliminy. Marcellus gave a response to this effect and he also was of opinion that a horse and a mare that had been broken in were recoverable by
Dig. 49, 15, 2. postliminy, because they might bolt without any fault of the rider. And
Topica. Cicero's evidence agrees herewith, for he says, "The following things may revest by postliminy: men, ships, mules, beasts of burden, horses and mares that have been broken in." Arms are not in the list, they do
Dig. 49, 15, 2. not revest by postliminy because they can not be lost without blame.
Bk. 3, ch. 16. More will be said on this point hereafter.

[35] And now (unless I mistake) we are naturally brought, by what has been already said, to a question which in different ways has proved exceedingly troublesome to nearly all commentators. I refer to the well-known question whether things captured by the enemy and then recaptured from them ought to be restored to their former owners, or not. Some say, aye; some say, nay; others foolishly divide and subdivide, to the satisfaction neither of themselves nor of any one. Some there are who draw a distinction between movables and immovables and

Dig. 49, 15, 20, 1.

hold that the latter must always be restored and the former never. There are others who distinguish immovables recovered by an exploit of war—which they would refuse to restore—from immovables ransomed under a bargain, which they would allow to revest in the former owner on his tendering the amount of their ransom.

By inference, Dig. 49, 15, 28. Ang. Salic., Jas. Mart., Laud. and others whom Covarruv. mentions, on c. 4, Reg. jur., in vi, 2, relect. §11.

Lastly there is a school which declares that all recaptured property, movable or immovable, without any distinction, ought to be unconditionally restored to the former owner—and this despite the unmistakable opinion of Labeo, who says in one place: "Whatever is captured in war is booty and does not revest by postliminy"; and in another place: "What has been captured by the enemy and then recaptured by our side, only revests by postliminy if it be of a kind to which postliminy applies." Marcellus approves this distinction. And the school in question ignores this point, that slaves recaptured from the enemy are (pursuant to the imperial rescript) to be restored to their former owner, precisely because there is postliminy—not only in the case of freemen, but also in the case of slaves. And, so, the response of Octavenus, affirming that property in the enemy's hands can be bequeathed and is subject to postliminy, must undoubtedly be understood as referring only to property of a kind which admits of postliminy, in accordance with the distinction drawn by Labeo.

By inference, Cod. 8, 50, 2. Dig. 49, 15, 12, 7. Franc. Ripa on Dig. 41, 2, 1. Covarr. in place named and others cited by him.

By inference, Cod. 8, 50, 2. Dig. 30 and 41, 1, 44. Joh., Andr., Alex., Pyrrh. and others mentioned by Covarr. on c. 4 Reg. jur. in vi.

In Dig. 49, 15, 28.

In Dig. 49, 15, 30.

Dig. 49, 15, 2.

Cod. 8, 50, 2.

Dig. 49, 15: 19, 10 and 12(7) and 30.

Dig. 30, 9.

Dig. 30, 9.

[36] Note also that, though enemy property is not a subject of transfer (*in commercio*), yet things which the enemy has captured may, if of a kind which admits of postliminy, be sold and bequeathed or alienated in any way whatsoever. Livy furnishes us with an example of the operation of this principle. When Hannibal had got as near to Rome as the fourth milestone, he heard that the very spot on which his camp was pitched was selling at exactly the same price as before his arrival; this enraged him so much that he had a herald fetched and bade him announce the sale of the silversmiths' shops in the forum at Rome; now the sale of the land was perfectly valid because of the chance of postliminy, but the sale of the shops was invalid because they had never been the enemy's and there was no postliminy as regards them.

Dig. 45, 1, 103.

Bk. 25

Dig. 10, 2: 22 and 23 and 30(9).

Dig. 10, 2, 22.

Dig. 45, 1, 103.

And I do not think that the question is affected by the citation from the Digest (*de acq. rer. dom.*) * of the passage in which Pomponius deals with the case where wolves carry off my swine from my herdsmen and a neighboring farmer follows them up with stout dogs and rescues the swine; the jurisconsult laid it down that the swine do not become the farmer's but remain mine, as long as any one could have recovered them, and he distinguishes the case where my neighbor by the same means deprived me of some wild animal, seeing that a wild animal ceases to be ours if it passes out of our control and it becomes the property of the captor.

* Dig. 41, 1.

This passage, I repeat, does not affect the question; for, in it, Pomponius expressly says that swine and other tamed animals remain ours, Instit. 1, 2, 16. even though carried off by a wolf, as long as they can be recaptured, just like goods lost in a shipwreck; and he says that an action on theft would lie on these facts; but the case of property taken from us by the enemy is entirely different, for it is incontestable that the ownership therein passes Dig. 49, 15: 28 and 24. immediately to the enemy. It is, accordingly, a better parallel to say that just as we lose our ownership of a wild animal when it passes out of our control, and the animal becomes by *occupatio* the property of any Dig. 41, 1, 44 and Instit. 2, 1, 12. subsequent captor, so it is with things captured by the enemy: we immediately lose our ownership of them and they become his who retakes them and the former owner has no claim for restitution, unless they are Dig. 49, 15, 30. of a kind which admits of postliminy.

And this is fatal to the doctrine that all movables without distinction become the property of those who rescue them from the enemy, and also to the doctrine that a distinction must be drawn between things that have been recaptured by military exploit and those that have been ransomed by bargain.

To sum up: those things which admit of postliminy revest, on recapture, in their former owner and resume their former status, whether Dig. 49, 15: 2, 4, 20(1), and 30. And Cod. 8, 50, 2. movables or immovables, and whether their restoration is due to military exploit or to bargaining or is brought about in any other way—subject Leading text in Dig. 49, 15: 4 and 26. Instit. 1, 12, 5 and Cod. 8, 50, 2. to this, that the ransom-price of those things that have been ransomed Dig. 49, 15, 12, 7. Cod. 8, 50, 17. must be repaid; but those things which do not admit of postliminy pass Dig. 49, 15: 28 and 30. as booty to the captor.

[37] It must, however, be observed that booty only begins to belong to the enemy at the moment when it is taken within his lines (*intra* Dig. 49, 15: 5, (pr.) and 19(10). *præsidia*). If, then, it is recaptured before having been taken within Dig. 49, 15, 5, pr. the enemy's lines, it must be unconditionally restored to its former owner, for it has never ceased to belong to him, never having become the enemy's. And, should those who have retaken the booty have fraudulently allowed it to be first carried off by the enemy and taken within his lines and neglect to follow it up, they will not only have to restore to its former owner what they have retaken, but they must also make good to the owner anything which they might have succeeded in saving, and which has been lost through their fault. There is an excellent rule to this Span. Ordin., bks 26 and 31, tit. 6, par. 2: and bk. 13, tit. 9, par. 5. effect in the constitutions of the Kingdom of Spain, and there is a text on the subject in Dig. 6, 1, 17. Last §.

[38] Once more: property taken by pirates or brigands or those who are not "just" enemies is not affected in any way by the distinction whether or no the recaptured thing is of a kind which admits of postliminy or by the question whether or no it has been taken *intra præsidia;* for the things which such persons capture never pass into their owner- Dig. 49, 15: 24, 27, and 19(2). And 28, 1, 13. ship and accordingly, when they are retaken they must be restored, with- Dig. 49, 15, 27.

out any distinction or condition, to their former owner, who has never lost his ownership of them.

[39] This makes one wonder at that ordinance of the Kingdom of Spain according to which this distinction (namely, whether or no the recaptured property has been taken *intra præsidia*) applies to property seized by pirates and not only to property captured by enemies; for, if we take the moral and equitable point of view, we find that there is no law, human or divine, by which the ownership of captured property can pass out of the true owner to one who is not a "just" enemy, and so reason and justice require that such property when recaptured shall be unconditionally restored to its former owner, unless a contrary rule be found expedient in the public interest in order to increase the keenness of soldiers in the pursuit of brigands and pirates, especially since measures may be concerted for the public good, even when they involve private loss. This is the idea underlying Tacitus' remark that on every great occasion there is an element of injustice present in which the detriment of individuals is counterbalanced by the gain to the public. Otherwise the exception which we are considering seems quite harsh.

Span. Ordin., bk. 31, tit. 29, par. 2.

Dig. 21, 2, 11; and 6, 1, 15. And c. 53 (?) Reg. jur. in vi.

The Romans, moreover, often would order the restoration to their allies or citizens of booty which they discovered to have belonged to them when found in the possession not only of brigands and pirates, but also of a "just" enemy. Accordingly after the Volscians had been compelled to surrender and their camp had been captured, a part of the booty was handed over to the Latins and Hernicians, allies of the Roman people, who recognized it as their property. Similarly with the town of Sutrium: its inhabitants, allies of the Roman people, had surrendered their town by treaty to the Etruscans, as they were unable to endure any longer the siege of it; on the same day it was retaken under the leadership of Camillus, and before nightfall it had been restored to its inhabitants whole, inviolate, and unhurt by any havoc of war. So also on the capture of Carthage, which was full of statues and votive-offerings in the Greek style brought from Sicily, Scipio issued a proclamation inviting representatives from each quarter of the city to come and find out what belonged to them and take it away with them. But of course treatment of that kind depends on the complaisance of the general, who has, as we have shown, all discretionary power over booty.

Livy, bk. 4.

Livy, bk. 6.

Plut. Apophth.

[40] The following is a question on which there is genuine room for doubt: A thing is stolen by robbers or seized by "unjust" enemies and subsequently it comes into the power of a "just" enemy; from him it is won back by our citizens, either by military exploit or for monetary consideration: ought this thing to be restored to its original owner? Now Javolenus has a response to the effect that a stolen slave who subsequently falls into the hands of the enemy can not, nevertheless, be usucapted by a buyer, just because of the original theft. That the slave had

Dig. 49, 15, 27.

been an enemy's, or that he had become subject to the law of postliminy upon his return, would not have prevented usucapion.

I admit this in the case of a slave, because of the law of postliminy, but I should hesitate to follow it in other cases to which the law of postliminy is inapplicable, since it is certain that the thing has become enemy's property and that its original owner has thereby lost his ownership. For what difference does it make, so long as the war was a just one, whether the enemy has seized the thing from a true owner or from a thief? For the rule that the taint of theft, inhering in a thing, can not be purged until the thing returns into its true owner's power (as provided by the
Dig. 41, 3, 4, 6. *Lex Atinia*) only operates (so I think) between citizens and citizens, and not between citizens and enemies; and, in order that a thing captured in war may become our property, nothing more is needed than that it
Dig. 41, 1: 5 and 51. belonged to an enemy. This opinion seems to me agreeable to law; but I have no objection to every one using his own judgment. If, however, the final decision is that the thing continues *furtiva* (tainted with theft) I think it would be fair only to grant an action against the present pos-
Dig. 15, 1, 4, 5. sessors if the thief or his heir be insolvent.

So far then about corporeal things and persons, whether free or slave, captured in war.

[41, 42] Now there used to be a question whether incorporeal things also can be captured in war and transferred into the victor's ownership, and, assuming that they can, whether they are subject to the law of postliminy or not. That question underlay the celebrated lawsuit be-
Bk. 5, ch. 10. tween the Thebans and the Thessalians, which Quintilian mentions. For when Alexander overthrew Thebes he found a bond under which the Thessalians stood indebted to the Thebans in the sum of a hundred talents. This bond he gave to the Thessalians in requital of the military services they had rendered to him. Subsequently the fortunes of the Thebans were restored by Cassander and they brought action against the Thessalians. The point of the suit was about the effect of Alexander's gift of the bond. Now it is clear that Alexander could not make over that obligation to the Thessalians by way of gift since it was a matter of
Dig. 17, 2, 3 and Accurt. thereon. law cohering to the person in an inseparable manner; besides, matters of
Dig. 15, 1, 51. law are incorporeal and do not admit of manual seizure, and only those
Dig. 49, 15, 28. Instit. 2, 1, 17. things become the conqueror's which he has actually seized. Nay, they do not remain his longer than he is actually in possession of them, since they can be taken away from him by the same right as that by which he got
Dig. 49, 15, 28 them.

There is, further, a marked difference between the position of an
Dig. 5, 3, 1. heir and that of a conqueror; what passes to the former is a right, what
Dig. 49, 15, 28. passes to the latter is a thing. And the proposition that a public right of credit can not pass to the conqueror may be maintained on the ground that a public credit is due to each individual and so as long as there is a

single surviving creditor he is the creditor of the whole amount. Nay, the same people and State may be considered as surviving, even if there be no survivor of those living at the date of the contract, but only their successors. There is a considered opinion of Alphenus to this effect. Dig. 5, 1, 76; and 30: 24 and 22, at end.

[43] For the rights of a people do not reside in individuals, but in the *universitas* (aggregate), and this *universitas* is represented by successors as well as by those alive at any given time: and that is the meaning of saying that a *universitas* does not die or come to an end so long as there is even one survivor. Dig. 3, 4, 7, 2.

One remaining point may be urged in the case before us, namely, that the legal situation did not depend on the fate of the document, the writing not being the substance of the contract, but only furnishing evidence thereof; and, accordingly, Alexander got nothing and the Thebans lost nothing either by the seizure or by the gift of the document. Dig. 20, 1, 4. Cod. 2, 4, 2. Dig. 22, 4, 4.

However, notwithstanding all this, the decision in the case before us must be that the right of public credit was embodied in the document and vested in Alexander, and that Alexander could, accordingly, release the Thessalians from their bond-obligation to the Thebans, which he is taken to have intended by the gift of the document. For since the law of war invests the conqueror with power and dominion over the conquered and allows him to issue such commands to them as he pleases, he can not only seize their corporeal property, but also such as is mere matter of law, and he can lay down or repeal laws for them at his discretion. And seeing that (as Livy says) everything is yielded up to the military conqueror it is within his right and discretion to keep as much thereof as he likes by way of penalty.

Now a debt due is part of the estate of the creditor; hence any debts due to the conquered pass, with the conquered themselves, into the dominion of the conqueror; for he who is in the power of another can have nothing in his own power. The immediate result is that the ownership of the debt which the Thessalians owed to the Thebans vested in Alexander, and that when he made it over by way of gift to the Thessalians—for a gift of a document is taken to be a gift of the contents of the document, and an agreement not to sue is implied when a creditor returns the bond to the debtor—the Thessalians were in consequence freed from their debt. This will be our conclusion—unless we hold that the Thebans retook the debt by way of postliminy when Cassander came to their rescue; for when a person returns with postliminy, all matters of law are put in the same position as if he had never been in the enemy's power; and in that case we should have to assert that a State can be restored by the fiction of postliminy and be made the same as before, reacquiring its rights and status just as we have asserted with reference to the ownership of land which has been taken and retaken, and with reference to the usufruct thereof (which is mere matter of law); and it is in

Dig. 35, 2, 1, 13; and 15, 1, 9, 1. Accurt. on Cod. 4, 39, 2.
Dig. 50, 17, 118.
Cod. 8, 53, 1.
Dig. 2, 14, 2; and 39, 6, 18, 2.
Dig. 49, 15, 12, 5 and 6.
Dig. 49, 15, 20, 1. Dig. 7, 4, 23. Instit. 2, 2. Dig. 11, 7, 36.

this way that the fiction of postliminy operates in the case of sacred and religious places.

Suppose, however, that in the case before us the Thessalians had paid the debt to the conquering Alexander, in whom, as we have said, it vested: I hold that then, after the fortunes of the Thebans had been restored by Cassander, they would not have been able to invoke the law of postliminy, in order to reacquire a debt which had once been extinguished. A judgment to this effect in an almost precisely similar case is recorded by Joannes Paponius. (In Arrest., bk. 5, tit. 6.) For payment duly made utterly destroys an obligation, both civilly and naturally (as the jurist Pomponius says), (Dig. 5, 3, 25, 17, at certe.) (Dig. 46, 3, 107. Accurt. on Dig. 46, 3, 23.) it being in the nature of things that the manner of unbinding should correspond to the manner of binding. (Dig. 50, 17, 35.)

Now the law of postliminy does not restore things which in fact and nature have been lawfully destroyed; (Dig. 49, 15, 12, 2.) and, surely, matters of law have in this respect no supremacy over matters of fact. (Dig. 2, 14, 27, 2; and 50, 17, 8.) This is the basis of the rule whereby, although a slave can not bind himself even *naturaliter*, (Cod. 6, 24, 3.) (Dig. 15, 1, 41.) yet if any one repays a slave's loan—even the slave himself after his manumission—no action will lie to get back what has been paid; for one fact balances the other. (Dig. 12, 6: 13 and 64.) Between fact and fact there is an exact and harmonious proportion and resemblance; it is not so between fact and law; (Instit. 3, 28, 1.) but between law and law it is so in a very striking manner. (Dig. 50, 17, 106.)

Accordingly, if the mode in which the Thessalian debt was released was either formal discharge (*acceptilatio*) or an agreement not to sue or the return of the bond—involving much less evidential certainty than payment does—then, (Instit. 3, 28, 1; and 4, 13, 3. Cod. 8, 42, 14.) since there has been no intervention of a matter of fact, the right of credit must be held to revest in the Thebans by law of postliminy. For in none of these modes is the obligation destroyed quite as it is by payment, (Instit. 3, 28 and Dig. 5, 3, 25, 17.) for payment utterly destroys the obligation, by the fact itself, nor have equity and good faith (which prevent the same debt from being paid twice over) the same operation in the cases named. (Dig. 50, 17, 57.)

And indeed, if the documents which we are dealing with had been seized by any other than a sovereign prince (such as Alexander was) my opinion is that no right could have been claimed by him in reliance on the considerations just urged by us against the contrary opinion, and that there would, accordingly, be no occasion for the fiction of postliminy—not even if the documents related to a private right of credit, unless the creditor in whose possession the documents were, chanced to be a prisoner of war, i. e., one who in olden times would have been made a slave, incapable of owning anything and subjected to another's ownership both as regards person and property. (Dig. 41, 10, 1.) Since, however, prisoners taken in war between Christians are not nowadays enslaved, the case is different, for the person of the prisoner does not pass into the ownership of his captor, nor does any right which is so inherent in his person as to be inseparable from it, vest in his captor. (Dig. 17, 2, 3 and Accurt. thereon.)

Chapter VI.
Of keeping faith with an enemy.

1. The Romans paid great respect to good faith.
2. When we have given our word to an enemy, whether in public or in private, it must be kept.
3. The edict *quod metus causa* inapplicable where we have given our word to an enemy.
4. Perjury can not be justified by resort to subterfuge or trick.
5. Whether the giving of hostages discharges the obligation to keep faith.
6. Whether faith must be kept with an unjust enemy.
7. The laws of war not framed for unjust enemies.
8. Agreements extorted by tyranny or rebellion are not binding.
9. The prince can not alienate what belongs to the royal prerogative.
10. The special functions of the sovereign.
11. Agreements made with rebel subjects have no validity.
12. Rebels and brigands to be put down by force, not by bargaining.
13. Faith not in every case to be kept with an enemy.
14. An oath to commit an unlawful act not binding.
15. An oath by a private person to do something detrimental to the State not binding.
16. Better to abstain from unlawful oaths than to break them.
17. Faith need not be kept with an enemy who has broken his word.
18. Whether a truce subsists if the enemy breaks it.
19. A truce may be granted to continue for a long period.
20. Meaning of saying that faith need not be kept with one who has broken his word.
21. Unlawful to requite perfidy with perfidy.
22. Whether an agreement induced by fraud is binding.

[1] They of olden time always held that there was no grander or more sacred matter in human life than good faith; and the Romans had Good Faith placed next to Jupiter Optimus Maximus in the Capitol; and when they had once pledged their word, there was nothing more durable. And so Aulus Gellius tells us that, while the Roman people carried to a high pitch the reverent pursuit of all kinds of virtue, yet they revered good faith over and beyond all, holding it sacred alike in public and in private affairs. (Noct. Attic., bk. 20, ch. 2.) Among the numerous proofs and examples of this, the following is extremely striking. When the arrangement of a truce between them and Perseus was being celebrated with public games in the Circus, some of the enemy's chieftains entered and took part in the chariot race and they were crowned as winners. Aye, and the Roman people gave up very illustrious consuls to the enemy rather than suffer their public good faith to be impugned, as we have elsewhere mentioned in connection with Postumius and Mancinus. (Above, ch. 1.) On this account King Ptolemy, of Egypt, recognizing the good faith of the Roman people, made a will appointing them guardian of his infant son and heir. And Ulpian speaks truly in saying that it is a serious thing to break faith; (Dig. 13, 5, 1.) nor is anything so characteristic a manifestation of good faith as the keeping of agreements. (Dig. 2, 14, 1.)

Offic., bk. 3.

Further (as Cicero says) our forefathers insisted that there was no more rigid fetter for safe-guarding the inviolability of good faith than the oath. This is demonstrated by provisions in the Twelve Tables, by religion, and by treaties in which the obligation of good faith, even with an enemy, is postulated.

Indeed the Romans, in addition to their sedulous respect for the laws of war and peace in general, attached a most sacred importance to the keeping of good faith on every occasion when circumstances led them to give an undertaking to the enemy. Accordingly we have that renowned reply given by Sextus Pompeius, son of the great Pompeius, to Menodorus, the admiral of Pompeius' fleet. Pompeius had made an alliance with Antonius and Octavius, and they were dining with him on board ship off Puteoli. Menodorus sent a message to the effect, first, that it was the very moment for Pompeius to avenge the death of his father and brother and seize the opportunity of claiming his father's sway for himself; and, secondly, that he would see that no one escaped from the ship. Pompeius replied, "Would that Menodorus could accomplish this without me; perfidy is befitting to him, but not to Pompeius."

Appian, Civil war, bk. 5.

[2] There are, however, those who hold it obligatory to keep faith with an enemy when publicly given, but not when given by a private person—a position unsupported by any solid arguments and at variance with the examples furnished by men of old and with the institutions of our forefathers and with the teaching of the weightiest philosophers, as described by Cicero in his elegant manner and by Gellius. Accordingly, whenever a transaction is entered into with a just and lawful enemy, I hold that terms and agreements relating to the war and hostilities ought not to be perfidiously upset, even when they have been entered into by private persons, for it is a serious thing to break faith.

Bartol. and others on Dig. 2, 14, 5. Zas. in apolog. against Eck. and in Jud., qu. 3.

Offic., bk. 3.

Bk. 7, ch. 10; bk. 20, ch. 1.

Dig. 13, 5, 1.

And certain duties are owed (as Cicero points out) even to those at whose hands we have suffered wrong. In this connection we have the fine deed of Marcus Attilius Regulus. He had been taken prisoner by the Carthaginians in the first Punic war and been sent to Rome, under an oath to return, in connection with an exchange of prisoners. Immediately on his arrival he dissuaded the Senate from returning their prisoners; and then, when his relatives and friends would have kept him, he preferred to return to punishment rather than break the word which he had given to an enemy. St. Augustine highly extols this conduct. Jacob, too, was incensed with his sons, Simeon and Levi, for violating the agreement which they had made with the Shechemites and he cursed them on his death-bed.

Offic., bk. 3.

Text in c. 3, C. 23 qu. 1. Dig. 49, 15, 5, 3. Fortun. and Duaren. on Dig. 2, 14, 5. Decius on Dig. 50, 17, 65. Covarr., bk. 4. Decret. 2, par. C. 3, §4.

Cic., Offic., bk. 3. Val. Max., bk. 1, ch. 1.

Kingdom of God, bk. 1, ch. 18.

Genes. 34.

Genes. 48.

We must also repudiate the doctrine that there is no need to abide by an agreement which the enemy has obtained by force. For, as Cicero puts it, you can not apply force to a brave man, and good faith (which

Seneca terms the most sacred possession of the human heart) can not be debauched by the stress of any necessity or perverted by any lure. Cicero, accordingly, writes: "There is nothing which is capable of exercising upon one a greater degree of duress than good faith does."

Epist. 89.

[3] Further, when the prætor's edict promises *restitutio in integrum* (rescission of the transaction) in cases of duress it does not refer to that duress which is lawfully exercised, as in a "just war," or to engagements formed with the enemy, but between citizen and citizen. And the force of an oath in earlier days is shown by the case of Marcus Pomponius, tribune of the plebs. He had named a day for the trial of Lucius Manlius, son of Aulus, on a charge of having added a few days to the period of his dictatorship and also of having banished his son Titus, later styled Torquatus, and having ordered him to live in the country. Thereupon a youthful son of Lucius Manlius, who gathered that his father was in trouble, came with drawn sword and compelled Pomponius, in the absence of any witnesses, to swear that he would release his father. And, although this put him under no legal compulsion so to do, yet he stopped the proceedings against Lucius Manlius and released him.

Leading text in Dig. 4, 2, 21. Panormitan. on c. 2, X, 1, 40, col. 3, and c. 6, X, 1, 40. Felinus on c. 5, X, 2 25, nu. 20. Dom. on c. 4, Dist. 5, last col. Sylvest. on word metus, qu. 6.

Cic., Offic., bk. 3. Livy, bk. 7.

And so Ferrandus the Deacon, writing to Count Reginus on the subject of the duty of a true and pious Christian general, fitly condemned false swearing in order to deceive any enemy, no matter how inveterate and dangerous to the State, or how great an obstacle to peace his life is and how great a help his death would be, seeing that divine claims are higher than human and (in the words of Peter, chief of Apostles), "We ought to obey God rather than men." Wherefore, with whomsoever we are at war, as the aforesaid Ferrandus says, even when no good faith has been pledged in the war or when peace was made, the State must be saved or served by an inviolate respect for the oath; for what advantage will it be to conquer one whom the Devil, by making him swear falsely in the hope of victory, has conquered already. Accordingly, when the Psalmist sings, "Lord, who shall abide in thy tabernacle? who shall dwell in thy holy hill?" he answers himself with these words which he puts into God's mouth: "He that speaketh the truth in his heart, that backbiteth not with his tongue, nor doeth evil to his neighbor, nor taketh up a reproach against his neighbor; who sweareth to his neighbor and deceiveth him not."

Acts 5, 29.

Psalm 15.

Now, says the Deacon already mentioned, he swears to his neighbor and deceives him not who carries out in conduct whatever he has sworn with his tongue; and let no one imagine that an enemy with whom an oath is made is not included in the word a "neighbor," for the object of the oath is that he should be reckoned a neighbor. A treaty of peace turns an enemy into a friend. It is, therefore, the height of impiety to swear falsely and, considered closely, such conduct is unprofitable and

hurtful in the extreme to a general or leader of an army, for the sacredness of the oath is the bond of military discipline and if the general sets the example of lightly esteeming it as regards both enemy and his own men, everything must fall into muddle and confusion, for he will not be able to rely on the word of his enemy or on the fidelity of his own men.

Whatever, then, is confirmed by the addition of an oath and the invocation of God's name—whether it be a promise of clemency to an enemy or of pardon to the guilty or of reward for good conduct to the troops—must not be brought to naught by any consideration of expediency or by any fear of danger. A declaration, to the good faith of which God has been invoked as witness, must stand fixed and unchangeable.

[4] We must, in addition, check all attempts to overreach by false swearing and to impair the sanctity of the oath by a sort of chicanery and over-cunning and perverted interpretation of the law—such as his who during a truce of thirty days used to go ravaging by night; or such as that of Quintus Fabius Labeo, who (according to some accounts) being entitled, under a treaty made after his defeat of Antiochus, to keep a half part of Antiochus' fleet, cut each ship in half in order to deprive the king of the whole of his fleet. A similar example was furnished by one of the ten whom Hannibal sent to the Senate after the defeat of Cannæ, under an oath to return to his camp if they failed to arrange for a ransom of prisoners. This man stayed behind in Rome on the pretext that he had returned to the camp very shortly after leaving it and that this return released him from his oath. This was incorrect, for, as Cicero says, fraud may foil perjury but does not annul it, and so the Senate ordered the sly old fox to be bound and taken back to Hannibal.

Cic., Offic., bk. 1.

Val. Max., bk. 7, ch. 3.

Cic., Offic., bk. 3. Livy, bk. 22.

And the answer of Censorinus (if we may trust Appian) is susceptible of an explanation in this sense. The Carthaginian envoys had remonstrated because, after their surrender of hostages and all arms, he proposed, in defiance of his pledged word, to destroy Carthage into the bargain; he replied that when the Romans undertook that Carthage should be free they did not mean by the word Carthage the town and the soil.

Punic war.

[5] Nor is that opinion sound which is maintained in some quarters, that the giving of hostages operates to discharge one from the obligation to keep faith. That is the ground upon which Bodin held that Francis of France was freed from the obligations of the treaty of Madrid, because he had given his sons as hostages—on the analogy of the peace of Caudium, which Bodin asserts to have been discharged after hostages had been given. This, however, is contrary to the truth of history, for when the consul Postumius, the author of the peace, was asked his opinion, he declared that the Roman people were not bound by the undertaking into which he had himself entered with the Samnites,

Republic, bk. 1, ch. 8.

because he had entered into it without authorization from the Roman people. His words were: "I do not deny, Conscript Fathers, that engagements and treaties are alike binding among those peoples who put the observance of good faith in the same rank as their duty to the gods, but I assert that no solemnity which the people have not authorized can cast a binding obligation upon them." He declared that he was himself, however, bound by the engagement, whether justifiable or unjustifiable, and he started and supported the proposal that, in order to free the Roman people from any obligation and to enable them to repudiate the peace with the Samnites, he and the other authors of the peace should be delivered up, and this although six hundred knights had been given as hostages, who would be put to death if the bargain were departed from. Livy, bk. 9. Cic., Offic., bk. 3.

Now hostages, like sureties and pledges, are accessory to some principal obligation, in order the better to safeguard the interests of the other party, and so little do they destroy the principal obligation that they can not exist apart from it, any more than an accessory in general can exist apart from its principal or an accidental quality without the subject in which it inheres. Instit. 3, 20, pr. Dig. 44, 7, 1, 7. Dig. 46, 1, 16, pr.; and 20, 1, 33. Alciat. de sing. cert. ch. 44. Dig. 50, 17, 178; and 8, 4, 1.

Francis, accordingly, ought to have kept faith—if not the public faith (so far, maybe, as concerns those matters as to which the assent of people and estates was required), at any rate his own faith—and he ought to have returned to prison rather than break faith, following the example of Postumus, Mancinus, Regulus, and others; and this all the more because a prince, to whom the people has intrusted all its sovereignty and power, is the fit and proper person to frame bargains about State affairs, whether it be a case of making peace or any other arrangement with the enemy. Dig. 1, 4, 1. Dig. 2, 14, 5.

The behavior of John of France, then, was more correct. The English had taken him prisoner in battle and had released him on his parole that he would return if the terms arranged were not wholly carried out; and, as he could not perform all that had been agreed, he preferred to return to captivity rather than to break his word—and this although he had himself given a son as hostage. Bodin, Republic, bk. 1, ch. 8.

[6] Now what we have laid down about keeping faith with an enemy must be scrupulously observed whenever we are dealing with a just and lawful enemy; but if any one happens to be compelled, by one who is not a "just" enemy, to pass his word about paying a ransom-price or such like, we hold that he is under no obligation to keep his word. Text in c. 2, and c. 29, X, 2, 24, and c. 2, X, 2, 13.
Offic., bk. 3. And so (as Cicero says) if you fail to pay to pirates the sum promised for sparing your life, there is no fraud, not even if you swore to do what you have failed to do, for a pirate is not included in the list of State enemies, but is the common enemy of all and we ought to have no matter of good faith or oath in common with him; and that is the reason why the jurists say that brigands and pirates are not denoted by the word "hostes." Dig. 49, 15, 24; and 50, 16, 118.

[7] The laws of war, therefore, and of captivity and of postliminy, which only apply in the case of enemies, can not apply in the case of brigands; and those who are taken prisoners by pirates or brigands remain entirely free. Since then those alone who are "just" enemies can invoke to their profit the law of war, those who are not reckoned as "hostes," and who therefore have no part or lot in the law of war, are not qualified to bargain about matters that only inure to the benefit of "just" enemies, nor are they justified in effecting such bargains by coercion.

Dig. 49, 15, 19, pr. Dig. 49, 15, 24; and 50, 16, 118. Dig. 49, 15, 19, 2. Dig. 49, 15, 24; and 50, 16, 118; and 49, 15, 19, 2. Leading text in c. 29 and c. 2, X, 2, 24 and c. 2, X, 1, 40.

And so, the edict of the prætor which promises rescission of transactions induced by duress is applicable; nay, anything done or promised in these circumstances is *ipso jure* void and will not be validated by the employment of an oath, for there is no confirming what is null, nor does an oath carry any obligation when it was extorted by gross and abominable compulsion. For greater security, however, absolution can be sued for and ought willingly to be granted.

c. 2, X, 1, 40 and Dig. 4, 2, 1. Cod. 2, 18, 1. Dig. 4, 2, 22. Cod. 1, 14, 5. c. 1, and c. 15, X, 2, 24. c. 15, and c. 29, X, 2, 24.

What we have just now been saying is not vitiated by the fact that the law allows a robber the actions on pledge and deposit and loan, for this is the case when he contracts with some one other than his victim; he may well be a robber as regards him whose property he has seized without being a robber as regards him with whom he has made the contract, since in matters of contract the standard of good faith is fixed between the contracting parties only, without bringing in any outside considerations.

Dig. 13, 7: 22, and 22(2). Dig. 16, 3: 1, 39, and 31. Dig. 13, 6, 16; and 5, 1, 64. Dig. 16, 3, 31, 1.

Again, our remarks about pirates and brigands apply equally to rebels: they can not be called "just" enemies, the two ideas "enemy" and "rebel" being quite distinct; and no one ought to be profited by his own wrong-doing. It is, however, true that, comprehensively and colloquially, all those are called enemies against whom we carry arms.

Dig. 49, 15, 24; and 50, 16, 118. Extrav., Hen. VII, Qui sint rebelles. Dig. 47, 2, 12.

[8] It follows that those agreements which are extorted by a usurping force need not be respected; for consent, which is a necessary element in all contracts, is wanting in acts which have been procured by violence; transactions entered into in such circumstances are therefore void. Cicero, accordingly, lays it down that the laws of usurpers are not laws, especially naming the *Lex Valeria*. This law was introduced by Lucius Valerius Flaccus, who had been nominated *interrex* by the Senate when the slaughter of Carbo and Marius left the State without consuls and the Republic was overborne by the arms of Sulla. It proposed the appointment of Sulla as perpetual dictator in order to re-establish order in the State and the ratification of all that he had done, whether as consul or proconsul. And the same writer, Cicero, shows that this was of all laws the most unjust and un-lawlike.

Dig. 44, 7: 2 and 3. Dig. 4, 2, 22, and Cod. 2, 20, 11. And c. 21, C. 23, qu. 8. Laws, bk. 1. Orat. bk. 3, against Rull.

Precisely the same thing holds good of those agreements which a lawless people (called usurper, too, by Cicero) extorts by rebellion from

its prince; and, indeed, if some have hesitated to admit that a prince and his subjects can be bound contractually, what are we to say of public agreements extorted by subjects through revolt and perfidy? For, inasmuch as rebels by the mere fact of rising against their prince violate their pledged word, it is vain for them to demand that faith be kept with them. (We shall soon have something to say on this point.) And how is it to be expected that any treaty will be ratified or any pledge be treated as sacred by those who, in violation of both divine and human law, have not shrunk from the depths of infamy and perfidy in their betrayal of their country. Or how can they swear by God who oppose what He has ordained? Or how can there be a compact of peace, in which nothing can be granted to him with whom the peace is made?

Bartol. on Dig. 43, 24, 3 4. Bald., on Feud. law, c. 1, 7 and on c. 1, X, 2, 19, and on Cod., 2, 4, 43. Panormit. on c. 13, X, 2, 1. Specul. 2, 2, de instr. edit. §11. Anchor., Consult., 2. Felinus on c. 1, X, 2, 19, and others named by Bodin, Repub. 1, 9.

Cic., Philipp., 12.

Moreover "unjust" enemies, as we have just shown, can not avail themselves of the law of war; for, as Cicero says, there can not be a just cause for taking up arms against one's country, and, consequently, against one's prince, who is the common father of all and has received all his power from God.

Nov. 98 (end). Paul, Rom., ch. 13.

Further, seeing that the people can not even treat with outsiders about the concerns of the commonwealth—this matter being in the sole prerogative of the prince to whom the whole State has been intrusted and who has in his hands the choice of war and peace—much less can it drive the prince into an inequitable bargain; for the prince, whose office it is to give laws to his people and not to receive them, being outside the law, can not be fettered by any conditions of his subjects' imposition; nor can any one (as Ulpian says) give orders to himself and play the double part of coercer and coerced.

Dig. 2, 14, 5. Dig. 1, 4, 1. c. 4, C. 23, qu. 1. Dig. 1, 4, 1. Dig. 1, 3, 31. Dig. 36, 1, 13, 4; and 4, 8, 51.

[9] Nor can there be an obligation which rests on the pleasure of the promisor. This is the bearing of what the canonists tell us in various places, that the Pope can never tie his own hands. And these principles are even more cogent when the prince is damnified by the bargain in question. In such a case he can claim the same reinstatement (*restitutio*) as a minor, especially where it is sought to detract from the sovereignty of the prince: for just as sovereign princes are incompetent to alienate any part of their realms—they being only life-tenants thereof; or, if owners, then only in the sense in which a husband is owner of the dowry (*dos*) without any power of alienation—so it is also with regard to any of the attributes of sovereignty and the royal prerogative; and if any of them has been alienated in point of fact, it ought to be put back in its former position and the prince's successors are not bound by the contract. Things which are part of the royal prerogative are not *in commercio* (i. e., objects of transfer), but are so annexed to the crown as to be inseparable from it, and they can not be alienated even by the prince, not even on a considered judgment or of his own motion. This is in keeping with Gaius' dictum that things belonging to the divine or public law are not susceptible of private ownership.

Dig. 45, 1, 108, 1. Cod. 2, 53, 4. Bald. on Authent. Hoc amplius, Cod. 6, 42, 32 (Nov. 1, 1, 1). Joan Papon., in Arrest. 5, 10, generally. Cod. 3, 32, 9. Instit. 2, 8, pr. Dig. 31, 69, 3. Cod. 11, 62, 8, and 12, 56, 2, and 11, 60, 2. Dig. 30, 39, 7; and 36, 4, 17. Cod. 11, 62, 8; and 11, 60, 2. Decision of Andr. Iser. Luc. in Joan. Papon. Ompha. approves, and others whom Molin. cites and follows, Custom of Paris, tit. 1, gloss 5. nu. 23. Bartol., Jas., Cyn., and others whom Bodin cites, Repub., 1, 10. Dig. 1, 8, 1.

And even the employment of the oath will be of no avail in this matter, for the prohibition to alienate, being inherent in the thing itself, renders unlawful any oath thereafter taken. Whatever, indeed, belongs to the State or Kingdom can neither be alienated nor acquired by long user (*longi temporis præscriptio*): how, then, can those things which are reserved to the king's majesty in token of his sovereign power be severed from him, seeing that a prince does not lose his sovereignty even by a voluntary abdication?

c. 8, X, 3, 13, and c. 32, X, 2, 24.

Cod. 11, 62, 8, and 11, 60, 2.

Dig. 1, 18, 20.

And if (as is Ulpian's opinion) an agreement with a husband excluding the *beneficium competentiæ* (right of limiting his liability) and providing that he may be sued for the whole debt, ought not to be upheld, as being against good morals and inconsistent with the customary respect to which husbands are entitled, what must be our attitude towards a bargain which encroaches on the dignity due to the prince alike by divine and human law? There have been many writers, and much has been written, on this topic. It explains why a private person who usurps the royal titles and emblems is liable to capital punishment and to forfeiture of property; and in days gone by, under the *Lex Valeria*, any one who plotted to seize the throne was to be outlawed in body and in goods. And this also explains Bodin's doctrine that if the prince were to grant a special license to annul condemnations and remit penalties, it would be void, inasmuch as these are prerogatives of the sovereign and can only be exercised by him; and Baldus writes that no lapse of time bars the right of appeal to the sovereign prince.

Dig. 24, 3, 14, 1.

Baldus, c. 1, nu. 3, on Feud. Law ii, 56. Felinus on c. 12, and c. 13, X, 2, 26. Anton. Butr., on c. 13, X, 4, 17. Abbas on c. 12, X, 2, 26. Whom Zoannettus on Rom. Emp. mentions and follows.

Cod. 1, 23, 6; and 2, 15, 2.

Dion. Halic., Rom. antiq., bk. 5.

Republic, bk. 1, last ch.

Dig. 48, 18, 1, end; and 48, 19: 8, end, and 31 and 4.

Text in c. 19, X, 2, 24.

[10] Further, Bodin correctly enumerated the especial functions of a sovereign as follows: to appoint the higher magistracy and allot his duties to each magistrate, to enact or repeal laws, to declare or conclude war, to be the ultimate court of appeal from all magistrates, and to exercise the power of life and death. And even if judges inflict punishments on wrong-doers, it does not follow that the power of life and death is theirs, for they are strictly limited by the laws and have no power to remit the death penalty where it has been deserved, it being an attribute of the sovereign to determine when to temper law with mercy. And so, on the expulsion of the kings, some regretted the changed character of the State, saying that the king was a man and one could apply to him personally to obtain one's right or one's revenge; that one could win a favor and a boon from him, and that he could be angry or could pardon; but that the laws were deaf and inexorable things, utterly bare of indulgence and forbearance.

Bald. on Authent. Quas actiones, Cod. I, 2, 23 (Nov. 131, 6), nu. 14, para. Ex his apparet.

Method. hist., ch. 6.

Livy, bk. 2.

And so, when Cicero craved pardon for Ligarius from Cæsar, he said: "I never addressed a court in this manner: Pardon him, judges; he has erred and fallen; he did not consider; if ever hereafter, etc.; but to a father that is the usual strain. Before a court it is: He never did it, never planned it; the evidence is false, the accusation false."

The matters I have been referring to are, then, reserved to the prince; and when the Roman people, who were the repository of sovereignty, demitted many other matters to the Senate, they reserved these to themselves: Dionysius of Halicarnassus shows this over and over again. This applies especially to the power of appointing magistrates, passing laws, and deciding questions of war and peace; but the right of receiving ultimate appeals and the power of life and death were admittedly vested in the people by the *Lex Valeria.* These are matters which jurisconsults hold to be so integral a part of the prince's majesty that they can not be shared with others; and in addition they name the granting of permission to seize hostages and of concessions to gather taxes and tribute and the power to mint money and some other matters. There are, however, instances in which some of these have been allowed to others than sovereigns: see, for all of them, Joannes Paponius, generally.

Rom. antiq., bks. 2, 4, and 6.

Dion. Halic., Rom. antiq., bk. 5. Livy, bk. 2. Val. Max., bk. 4, ch. 1. Plutarch, life of P. Valer. Publicola.

Guido Papae, quest. 498.

In Arrest., bk. 5, 1, and follg. titles. Bodin, Repub., bk. 1, last ch.

[11] Again, Bodin remarks that, for the reasons just now set out, there are no agreements which are more easily upset or require more wariness than those which rebel subjects make with their prince, and so he recommends insurgents not to make such contracts themselves, but to induce some outside neighboring prince to act for them. My advice, however, would be that they should return into the right way and humbly seek forgiveness and try to earn their prince's clemency by penitence instead of vexing his soul with compacts that have no law or equity about them; for nothing is more mortifying to a prince than to enter into a compact with rebellious subjects and to keep faith with them. Accordingly we read in Livy how Philip, after his defeat by the Romans, found one thing more galling than all others, namely, that among the conditions which were imposed on him by the Romans was one which deprived him of his right to chastise the Macedonians for revolting from him in the war.

Bk. 39

Those conventions, then, being bad which impair the majesty of the king, there can be no doubt about our attitude towards those which affront the Majesty of God (which can not suffer any derogation at man's hands, either by contract or by any length of prescription). Consistently herewith, Themistocles was wont to tell the Athenians, and Cato was wont to tell the Romans, that men can not acquire by usucapion anything which is the due of the Divine Majesty nor private persons anything belonging to the State; and Gaius similarly laid it down that things *divini juris* or *publici juris* are in no man's private ownership. And that noble passage of Ambrose is all in the same direction, in which he says, regarding the Emperor Valentinian:

Plutarch, on Themistocles and Cato of Utica.

Dig. 1, 8, 1.

Epist. 33.

" I am sued by court officials and tribunes, claiming a speedy delivery of the Basilica, and they say that the Emperor is within his right, because everything is under his power; my reply is that if he wants from

me anything that is mine—my land or my money—I shall make no opposition as regards any right of mine of this kind (although all that is mine might be said to belong to the poor); but the things which are God's are not subject to the imperial power."

Further, although compacts with brigands and rebels are invalid, as we have just shown, yet the prince would do well to abstain, as far as possible, from making them, both because they ill befit the prince's majesty and because there are certain evils which it is better to endure rather than that there should be any truck with the wicked. c. 3, C. 32, qu. 5.

[12] Moreover, the Romans pronounced it disgraceful in the extreme to make any terms with pirates, brigands, or rebels about peace or war or truces; and so we read that they would never arrange matters by a treaty or compact with those subjects who had revolted against the Roman sway; nay, they never rested until they had subdued them all, either by hard fighting or by compelling them to surrender, as we read was the case with the Latins and Campanians and other rebels. Cicero accordingly dissuaded Plancus from arranging a peace between Brutus and Antony, calling Antony's men the foulest of robbers, who either ought to throw down their weapons and beg for peace or, if they sought it with weapons still in their hands, ought to learn that peace is procured by victory and not by bargaining. And Cicero added that those who advised the despatch of envoys to Antony were ignorant of the laws of war and of the examples of their forefathers, and of what was required by the majesty of the Roman people and by the dignity of the Senate; for it was not the time for verbal requests, but for armed compulsion. And Cicero termed this war inexpiable, asserting thereby that the possibility of peace was excluded. Epist. 6, bk. 10. Philipp. 5. Philipp. 13.

Similarly in the Social war, this war was commenced by the allies of the Roman people in the hope that they would no longer be subject to the Roman dominion but would become sharers in it, and they sent a mission to Rome to complain that they were not admitted to the rights of citizenship, although it was by their labor and assistance that the Romans had extended their dominions so far and wide. The Senate austerely replied that it would not receive their mission until they recovered their senses. Appian, Civil war, bk. 1.

The case of Tacfarinas teaches the same thing: He was a robber of good birth who had reached such a pitch of arrogance as to send an embassage to Tiberius and to demand into the bargain a dwelling-place for himself and his troops under a repeated threat of inexpiable war. Tacitus tells us that it was said that the Emperor never felt more indignation at any insult offered to himself and the Roman people than at this: Annals, bk. 3.

" That a renegade and freebooter should act in the mode of a regular enemy (*hostis*). Why, it had not even been granted to Spartacus, when spreading fire through Italy unavenged and destroying one consu-

lar army after another—even although the commonwealth was tottering under the tremendous wars of Sertorius and Mithridates—that he should be received by agreement into a position calling for such good faith: much less that Tacfarinas, a brigand, when the Roman people was at the height of its splendor, should be bought off by a treaty of peace and a grant of lands."

Thus Tacitus.

It is, however, usual to spare those who, without any compact, throw themselves on the good-faith of a commander. Fabius Maximus Æmilianus, accordingly, spared Conoba, a brigand-chief who had surrendered to him, and Augustus pardoned Crocola, a notorious brigand in Spain, upon whose head a price had been set and who had voluntarily given himself up; and Augustus caused the price to be paid to Crocola when he demanded it and forebore to punish him lest he should seem to play tricks in connection with the promised reward or to make treacherous use of Crocola's reliance on public law. (Appian, Span. war.) (Dion. bk. 56.)

[13] Again: there are occasions which are exceptions to the rule about keeping faith, and these occur not only when we are dealing with rebels and brigands and others who are not included in the list of enemies, but also when we are dealing with enemies and those who are arrayed against us in just war.

[14] First and foremost is the case where a person, overcome maybe by a weakness to which all are liable, has sworn to do something offensive to God, by whom he has sworn: he must not fulfil his oath, for an oath should not be a bond of iniquity, nor is it expedient to keep faith in wrongful promises, nor is there any bindingness in an oath, the taking of which violates good morals. Nay, he who does what is forbidden, simply because he has sworn to do it, adds one sin to another. (c. 22, C. 22, qu. 4.) (c. 69, Reg. jur. in vi.) (c. 58, Reg. jur. in vi.) (c. 1, Dist. 13, and c. 21, C. 22, qu. 4.)

Sometimes, then, (as St. Ambrose says) it is a breach of duty to keep one's word: Cicero, too, perceived this; so did Seneca in his *Hercules Œtæus,* where he says: (Offic., bk. 1.) (Offic., bk. 3.)

> Præstare fateor posse me tacitam fidem,
> Si scelere careat: interim scelus est fides.
>
> (I admit that I can pledge my word to silence when this is innocent: but otherwise to keep that pledge is guilty.)

For, in St. Augustine's words, to call the commission of a crime an exhibition of good faith, is to make a strange use of the term "good faith." David adopted a much juster course in departing from his oath to destroy Nabal than Herod did in killing a most holy man for his oath's sake. And Cicero is quite right in blaming the act of Agamemnon in sacrificing Iphigenia in pursuance of his vow to sacrifice to Diana the loveliest child in his kingdom; for, as Cicero says, it would have been far better not to carry out the promise than to commit a crime so foul. For the same reason we reprobate the deed of Gideon, similar to the (c. 20, C. 22, qu. 4.) (c. 2, and c. 4, C. 22, qu. 4.) (Offic., bk. 3.)

last-named, in having Jephtha's daughter sacrificed, in fulfilment of an oath.

An oath to do something unlawful ought, therefore, not to be performed and if there be any penalty attached to the non-performance it ought to be exacted from him who insists on the performance. And this holds true even where it is but a venial sin that is in contemplation.

Authent. Quod eis. Cod. 5, 4, 23, 2 (Nov. 51, 6). And Cod. 6, 25, 5.

Gloss on c. 6, C. 22, qu. 4. Felinus on c. 8, X, 2, 24. Roland a Val., consult., 98, nu. 18. Alciatus on Cod. 2, 3, 6, nu. 52.

[15] A corollary is that a pledge given by a private person to the hurt of State or Church must not be observed. This holds good where this hurt is the main point in issue, for the proximate cause must be regarded, not a remote cause. The case of Themistocles is in point here. When he was sent into exile, he betook himself to Xerxes, promising him that he would make war on the Athenians; subsequently that king called on him to keep his promise; and then, although he had received scandalous treatment from his fellow-citizens and been most humanely welcomed by Xerxes, yet he held it more honorable to put an end to his life than to fight his fatherland; so he committed suicide by poison.

Dig. 2, 14: 7(14) and 16 and 58. And 2, 8, 16. Glossators and doctors on Dig. 2, 14, 5, and c. 2, bk. 2, 11, in vi.

Bartol on Cod. 5, 27, 2. Alciat. De sing cer., c. 44. Text in c. 27, X, 2, 24 and c. 1, bk. 2, 11, in vi. Span. Ordin., last bk., tit. 28, par. 2.

Dig. 2, 14, 7 and doctors thereon: c. 2, bk. 1, 18, in vi.

We have also in this connection the fine discourse in which Caius Claudius begged Appius Claudius and the other decemvirs to resign their usurped power. The fact (if it were one) that they had made secret agreements with one another and had called the gods to witness their exchange of pledges, ought not, said he, to influence them; the keeping of such agreements would be impious, he insisted, and the breach of them a pious act, seeing that they were opposed to the interests of the citizens and the State; nor would the gods be gratified by being made parties to base, unjust conduct.

Dig. 25, 2, 21.

Plutarch on Themistocles.

Dion. Halic., Rom. antiq., bk. 11.

This idea is at the bottom of Ulpian's dictum that a partnership (*societas*) can not be formed with wrong-doing and dishonesty for its object; and it leads Cicero to declare that at times a breach of faith is a just act, e. g., to refuse to return a sword that has been deposited with one by a madman or by an enemy of one's country. For every act of ours ought to conform to the principles of justice, which are, first, to injure nobody and, second, to serve the common weal.

Dig. 17, 2: 53 and 57.

Offic., bk. 1.

And so the poets, too, condemn rash oaths in their fable of Phaëthon, the moral of which is that it would have been better to violate an oath than to intrust the reins of the sun to an unskilled youth, to the whole world's ruin. And Paulus supports this doctrine where he says that an agreement which is outside private competence must not be kept: Ulpian, too, lays down the general principle that no agreement which infringes the common law ought to be kept, not even when accompanied by an oath, the law being superior in authority to an oath.

Ovid, Metam., 2.

Dig. 2, 14, 27, 4.

Dig. 2, 14, 7, 16.

An oath, therefore, is void which is antagonistic to statutes and to the authority of the law. Hence in every oath there is an implied reservation in favor of paramount authority; and wherever the power of such a superior is involved, no oath can derogate from his power. For, one

Dig. 30, 112, 4; and 37, 14, 6, 4. Cod. 1, 14, 5. c. 19, X, 2, 24 and Felinus thereon: c. 16, X, 2, 24.

can not enter into an agreement relating to things beyond one's competence. It is for this reason that no stigma of perfidy attaches to Gonzalo, Viceroy of Naples, for his conduct in flinging Count Valentino into prison in obedience to an order from King Ferdinand, although he had pledged his word to the count that he would protect him. Hence, too, the emperors Severus and Caracalla intimated by rescript that they released from his oath a man who had vowed not to attend a meeting of the Senate.

Bodin, Repub., bk. 1, ch. 8.
[In l. ult. D. de adminic. (?).]

Nay, an oath which is opposed to the interests of the State is taken to be released by mere operation of law: Paulus is an authority for this where he says that the *Lex Julia* releases oaths which are in restraint of marriage. For a condition or promise in restraint of marriage was so much discountenanced among the Romans that it was utterly expunged from testaments and other documents and taken as unwritten.

Dig. 37, 14, 6, 4.
Cod. 6, 40, 2.
Dig. 35, 1: 62(2) and 74.

It will therefore be permissible to ignore private pledges in the interests of public security. For (says Cornelius Tacitus) the learned declare those transactions to be null and void where both the giving and the receiving are inconsistent with the welfare of the State; and, as comment on that opinion, we have the noble utterance of Postumius, in which he demonstrated that the Roman people were not bound by the arrangement which he had made with the Samnites, despite the exertions to the contrary of Lucius Livius and Quintus Melius, tribunes of the plebs, who had shared with him the authorship of the peace of Caudium and who were trying to show that the Roman people were bound by the oath, so as to save themselves from being surrendered.

Livy, bk. 9.

[16] It would, however, be much the safer and more praiseworthy course not to allow oneself to be driven by any fear of danger into pledging one's word to do something unlawful rather than to break the word so pledged; for he who vows to do something which is unlawful is, by the very fact, forsworn, and every conceivable evil is more tolerable than to truck with evil. And on this ground the intrepidity of Pontius, a soldier of Cæsar's faction, is indeed praiseworthy. He was out on the watch before Cæsar's quarters and was cut off by a troop of Scipio's guards; one chance of safety was given him, namely, that he should declare that for the future he would be a soldier of Cnæus Pompeius; but he hesitated not to reply: "I am much obliged to you, Scipio; but the match which you propose does not suit me."

c. 27, X. 2, 24
Gloss on c. 1, bk. 2, 11, in vi.
c. 3, C. 32, qu. 5.

Equal confidence was displayed by Caius Mevius, a centurion of Augustus: he had often brought off notable fights in the course of the war with Antony, but fell into an undetected snare of the enemy and was taken to Antony at Alexandria; there he was asked what the decision in his case ought to be: "Have me killed," said he, "for I can not be lured from Cæsar's service into yours by any bribe of safety or by any threat of death." But it was just this intrepid scorn of life which easily gained it for him; for Antony rewarded his valor with a grant of safety.

Val. Max., bk. 3, ch. 8.

And, not to mention individuals, Saguntum, a wealthy town in Spain, is a conspicuous, though sad, monument of good faith towards the Romans. After a protracted siege it was unable to defend itself from Hannibal any longer, and the Romans could send no help to it; so, spurning dishonorable terms of peace, the whole of Saguntum threw itself and all its goods upon the funeral pile rather than defect from the Romans to whom it was bound by treaty.

Livy, bk. 21. Val. Max. bk. 6, ch. 6. Florus, bk. 2, ch. 6.

[17] Lastly, faith need not be kept, not even when accompanied by an oath, with an enemy who breaks faith. This applies both to public and to private agreements; according to the verse,

c. 3 and c. 29, X, 2, 24. And Dig. 2, 15, 16; and 19, 1, 13, 8; and 5, 2, 27. Cod. 2, 3, 21; and 2, 4: 17 and 14.

Text in c. 29, X 2, 24, last §. Gloss on Dig. 2, 14 (?).

> Fallere fallentem, fraudemque repellere fraude,
> Exemploque licet ludere quemque suo.
>
> (Cheats we may cheat, and fraud by fraud evade,
> And trick each trickster by the trick he played.)

For it is part of the general law of contract that no one is bound by a contract unless the other party performs what he has undertaken, it being futile for one who refuses to keep faith with another to claim that that other shall keep faith with him. It is knavish to insist that a given principle applies as against the other side, but not as against oneself, and the prætor's edict meets such conduct by providing that whatever proposition of law one party sets up against the other party he must submit to himself. Nor can any one be charged with breach of faith in consequence; he is rather proceeding under the law of war, upon a new and the same most just cause, i. e., breach of faith, against enemies who have slighted both divine and human law. That is why infraction of treaties led the Romans to make war on the Sabines, Latins, Privernians, Volscians, Hernicians, Apulians, Samnites, Etruscans, Æquians, and Carthaginians, and on very many others, and why the Senate visited the infraction of treaty which the towns of Epirus had been guilty of in defecting to Perseus, by razing their walls to the ground and giving them over to the army to loot.

Cod. 2, 3, 21.

c. 75, Reg. jur. in vi. And Dig. 31, 77, 27.

Livy, bk. 35.

For circumstances that may hereafter arise are outside the scope of an oath, and, if some novel factor emerges, any one can refuse to carry out what he has sworn. This tallies with Cicero's doctrine, that there are occasions when duty completely changes shape, and the just course is not to keep faith, e. g., when it is a question of returning to a madman or to an enemy of one's country a sword that he has deposited with us. And there is implied in every oath a condition such as, "Provided that good faith be kept with me," or as, "Save so far as the other party is responsible for the non-performance of this agreement." If this latter clause is called into operation, a tacit release of the agreement is assumed to occur, and the first to contravene the agreement is alone taken to have broken faith, so that the consequential act of the other party can not be reckoned a violation of his oath.

c. 20, c. 25 and c. 35, X, 2, 24. And c. 2, X, 1, 9. And Dig. 38, 9, 11; and 2, 15: 5 and 9. And 2, 14, 35. Cod. 2, 4, 31.

Offic., bk. 1.

c. 3, c. 25 and c. 29, end, X, 2, 24. Dig. 19, 2, 54, 1.

Cod. 4, 33, 4.

c. 7, X, 5, 37.

This explains that well-known dispute between Romulus and Cluilius, the Alban dictator, as to which of them had been the first to depart from the terms of the treaty, for that one would alone be guilty of violating the treaty and the earlier act of non-observance would, accordingly, be held to be the subsisting cause of the war. For if a breach of faith occur with regard to some matter in contemplation of which the contract was entered into, the whole agreement falls to the ground and everything goes back into its original position.

Dion. Halic., Rom. antiq., bk. 3.

Cod. 4, 54, 6; and 2, 3, 21. Dig. 4, 3, 7.

Ulpian, accordingly, says that the action on partnership does not lie against one who retires from a partnership because of failure of some condition subject to which the partnership was formed. The same writer lays it down that a right of action on an unduteous will subsists unimpaired despite a compromise, should the heir break faith in carrying the compromise into effect. For there is a mutuality in an obligation whereby each party is so bound as that either is released on his side if the other fails to perform what he has undertaken. And this holds good whether a penalty is stipulated in the agreement or not, no penalty being due in the former case, and even when it is something quite unavoidable that prevents the other side from carrying out his part. For such a hindrance may save him from being *in mora* (accountable for delay) or from incurring a penalty, but it is inadequate to keep alive his right of action.

Dig. 17, 2, 14.

Dig. 5, 2, 27, pr.

Dig. 19, 2, 54, 1.

Alciat. on Cod. 2, 3, 21.

Dig. 14, 2, 10, 1, mid..

Dig. 19, 2, 15, 4.

All this applies, no matter how small the matter in which there has been a neglect to keep faith, unless it be so trivial that there is no likelihood of either side having attached much importance to it. Further, the duty imposed on each side to keep faith is so absolute that even if the moving consideration of the promise fails, the obligation none the less endures. Should it not be quite clear which of the two was the first to break faith, there must be a kind of mutual set-off and each must be absolved from the stipulated penalty; for it is a common saying that there can be set-off in cases of equal delict. Hence comes the admitted doctrine that a litigant may counter the craftiness of his opponent with craftiness of his own, picking out the crow's own eyes (as the saying goes); but this is subject to the provision that he has a good cause and abstains from such fraud as overpasses the boundary into crime, such as forgery, criminal knavery (*stellionatus*), and the like.

Dig. 21, 1, 1, 8.

Alex. on Cod. 6, 35, 11. Corn., Consult. 246, bk. 3. Alc., Consult. 167. Bald. on Dig. 18, 1, 72. Tiraqueau on title De jud. in reb. exig. ferend.

Dig. 18, 5, 10, 1.

c. 7, X, 5, 27.

Dig. 21, 3, 39.

c. 2, C. 23, qu. 2.

Gloss on c. 16, bk. 1, 6 in vi, versic. malignantium.

Butr. on c. 3. Reg. jur. in vi. Alciat. on Cod. 2, 4, 17.

[18] What has just been said is generally accepted with regard to compacts, or treaties, of peace, but there are many who reject it with regard to truces, it being thought that these ought to be considered inviolable, even though the enemy breaks his word with regard to them; and this opinion as being the sounder and juster has been adopted by the assessors of the imperial chamber, so Mynsinger tells us, and he adds a reason for the distinction, which others too rely on, namely, that when the period of a truce is at an end the aggrieved person can take measures

Vinc., Joan. Andr., Ant. de Butr., Card., Angel., Cast., Felin., Ias., Alciat., Laud., and the two Socini whom Petrin. Bel. mentions de re militari, par. 5, tit. 3, and Mynsin., cent. 4, obser. 7 and Decius, 3, consult. 21.

of vengeance. This reason does not seem satisfactory to me, especially as applied to time of war (when, in Livy's words, if you make never so small a delay at the critical moment, when opportunity is flying by, you will vainly try to repair the omission afterwards). Nor is the reason sound in law, for the only difference between peace and a truce is that the [Dig. 49, 15, 19, 1. Gell. bk. 1, ch. 25. Dig. 44, 7, 44, 1; and 45, 1, 122, 1.] one is perpetual, the other temporary, but the time involved neither intensifies nor diminishes the quality of the obligation. And exactly as peace is destroyed when one or the other party breaks faith, so also the dissolution of a truce is held to result, for, underlying each case is a common [c. 13, X, 2, 1, and [c. ille novit] and c. 2, X, 1, 34.] factor, i. e., a breach of faith; and no one ought, by his own guile or delict, to be a gainer or cause injury to others. [Cod. 4, 48, 3. Dig. 50, 17, 134, 1; and 24, 1, 3, 1.]

[Dig. 19, 2, 54, 1.] And, unless I mistake, there is a neat response of Paulus which fits this case. The facts were that a lessor had covenanted with a lessee, under a penalty, that he should not be ejected during the term. Paulus held, however, that if the lessee was in arrears with the rent for two years, the lessor could eject him without incurring the penalty, even if there had been no mention of the rent in the penal stipulation.

[19] For these reasons I am inclined to side with those who think [Pan., Imo., Alex., Decius, Alciat., Bell., Cor., whom Mynsinger cites, cent. 4, obser. 7.] that the same legal principles apply to a truce as to peace and treaties, especially so since a truce also may extend over a long period of time. [Gell. bk. 1, ch. 25.] We read that the people of Veii were granted a truce of a hundred years [Petr. Bell. de re milit., par. 5, tit. 3. Livy, bks. 1 and 2.] by Romulus, one of forty years by Servius Tullius, and one also of forty years by the consuls Lucius Furius and Caius Manlius, and a truce is [Livy, bk. 7.] reported to have been made with the people of Cære for a hundred years. And when the Volsinians were weary of war a truce for twenty years [Livy, bk. 5.] was granted them. The Tarquinians were driven by fear to crave a [Livy, bk. 9.] truce for forty years from the consul Decius. The Æquians obtained a [Livy, bk. 4.] truce for eight years. When the chief powers of Etruria (the Volsinians, Perusia, and Aretium) begged for peace, they secured a truce for [Livy, bk. 11.] forty years.

We read accordingly that the Romans treated a breach of a truce as a cause of war just as much as a breach of a treaty, and they were people who always observed the laws of war most religiously. And so they went to war with the Samnites in the same year in which they had [Livy, bk. 9.] granted them a two years' truce, because they had broken the truce. And they brought to a successful issue a war with the Etruscans, who in reply to a request for peace and a treaty with the Romans had received a grant of a thirty years' truce, yet had reopened the war a very little later in [Bk. 9.] flagrant breach of sworn truce. And in the same year, says Livy, the consul Fabius engaged with the rest of the Etruscans near Perusia, which had itself committed a breach of sworn truce; his victory was neither dubious nor difficult, and he would have captured the town also (for he marched near the walls after his victory) had not envoys come out to [Bk. 11.] surrender the town. The same writer, Livy, tells in another place how

the Romans made war on the Etruscans for making military preparations in breach of a truce. (Peace had been refused them, but they had been granted a truce for two years.)

There is this additional point, that greater sanctity attached to a treaty, which was made by aid of an imprecation*, than to a truce or other kind of agreement (*sponsio*). A treaty, accordingly, could not be concluded without a mandate of the people, or without the fecials and other solemn ritual, but we read that truces and other kinds of agreement were frequently made by generals without the fecials or other solemnity and without any mandate from the people. In the next chapter we shall show this at greater length. Livy, bk. 9.

And yet nothing (says Cicero) could be sacrosanct save what the plebeians and people (*plebs populusque*) had sanctioned and what had been rendered sacred either by its nature or by the solemn testimony of a statute or of a penalty whereby any offender is made *sacer* (i. e., outlaw). Well, then: if a treaty, which possesses a higher degree of sanctity, ceases to bind when the other party breaks faith in regard of it, much more is this the case with a truce. In orat. pro Corn. Bal.

No blame, however, attaches to those who during a time of truce receive provocation at the hands of a wrong-doer, yet abstain from all form of retaliation (especially where the damage in question has been but slight and temporary) with the idea of throwing on the enemy all the disgrace of breaking faith. This, however (Alexander asserts), is rather a matter of use and custom than a counsel of law. Consistent with it is the conduct of Scipio on an occasion when the Carthaginians not only had perfidiously broken a truce, but also had violated the Law of Nations in the person of his envoys. Scipio, nevertheless, declaring that he would do nothing unworthy of Roman institutions or his own character, let the envoys of the enemy, who had come to him at Rome at that juncture, return inviolate. By so doing Scipio earned much praise, but (if we must pronounce a verdict) he was bound to spare the Carthaginian envoys, no matter that the truce had been broken with the dastardly duplicity that appears in Livy's narrative. What was open to him was to renew the war (as in fact he did) without any stigma of perfidy; but he could offer no violence to the enemy's envoys, they being protected by the Law of Nations and declared inviolable and sacred, apart from any agreement for peace or a truce and even in the heat of war. And it is immaterial that the enemy have already broken a truce and done violence to envoys sent from the other side to them. Cod. 2, 3, 21. Livy, bk. 30. Dig. 50, 7, 18.

[20] Now, what we have said about not being bound to keep faith with one who breaks faith, must be limited to one and the same agreement which has been broken, and to matters included in one and the same sponsion, and to promises where the moving consideration of each party's promise is the promise of the other party. For things that are Alciat. on Cod. 2, 3, 21, nu. 31. Alex. on Cod. 2, 3, 21. Dig. 4, 3, 36 and Vecurt. there n.

* See following chapter, section 4.

[c. 3, X, 1, 2.] mutually dependent are to be judged upon one and the same principle; [Dig. 43, 16, 18.] but it is otherwise with things that are independent of each other. Accordingly, an offender against one law is not deprived thereby of the benefit of another law; and a man who is the instituted heir under an earlier will, but a substituted heir under a later will, may renounce the [Dig. 28, 6, 12.] inheritance under the earlier will and enter under the later one.

[21] In war, accordingly, even though you have a perjured, treaty-breaking foe to deal with, and one who has once and again and repeatedly played you false, yet you may not break your faith in return. This admits an exception (as already shown) when your enemy makes it impossible for you to perform what you have sworn—in all other cases it was always held a deep disgrace to requite perfidy with perfidy. In this connection Lucullus fell into disrepute. The Lusitanians had broken a treaty and made war, and Lucullus, surrounding them by a stratagem and in breach of his pledged word, had them all put to death with the utmost cruelty, after the fashion of barbarians and without any regard [Appian, Span. war.] for the dignity of Rome. And Servius Galba was accused before the assembled people by Libo, tribune of the people, for that, while prætor in Spain, he had, despite his sworn pledge, put to death a large body of the Lusitanians, when that tribe was renewing the war in breach of [Val. Max., bk. 8, ch. 1.] treaties.

[22] Lastly, a compact whether of alliance or of peace or of truce, is void if it has been obtained by fraud, for such agreements as are [Dig. 2, 14, 7: 7 and 9.] invalidated by fraud are not upheld by the prætor, and fraud inducing a *bonæ fidei* contract (i. e., one of a certain group of contracts in Roman [Dig. 4, 3, 7: and 4, 4, 16, 1.] law) makes the contract null by mere operation of law subject to this that the deceived party may, in his discretion, elect whether to affirm the contract or not; but the other party, who has committed the fraud, has [Cod. 2, 4, 26.] no voice in the matter, for no one, by his own guile, may profit himself [Cod. 4, 48, 3: and 7, 8, 5.] or injure others. The bad faith of one of two contracting parties sub- [Dig. 18, 1: 62 and 57. And 19, 1, 13, 5. And 17, 1, 60, 4.] jects the fate of the contract to the discretion of the other party.

We read, however, in Holy Scripture, how Joshua treated the Gibeonites. They were a neighboring people, belonging to a land which the Lord had promised to the Israelites; but, in order to secure peace at the hand of the Israelites, they had lied that they were strangers from a very far country. Joshua was deceived by this fraud, but when he discovered it he decided that the peace which he had granted could not be revoked, lest he should allow himself to commit the same perfidy which [Joshua, ch. 9, c. 23, C. 22, qu., 4. Offic., bk. 3.] he was reprobating in another. However (to quote St. Ambrose), on that occasion Holy Scripture uttered, not the ancient formula of the jurisconsults concerning fraud, but the opinion of the Patriarchs. Moreover, though Joshua took the Gibeonites out of the hand of the Children of Israel so that they were not put to death, yet he cursed them for their deceit and ordered that they should be servants to the congregation, [Joshua, ch. 9.] every one of them.

CHAPTER VII.

Of treaties and truces.

[1] Now concerning treaties wherein we pledge our faith to an enemy, be it remarked that in olden days three classes used to be made of those treaties whereby states and kings formally bargained for each other's friendship. Menippus, the envoy whom Antiochus sent to Rome about peace, lucidly discoursed of this to the consul Titus Quintius. The first class was that in which terms were dictated to the vanquished in war. For since all their property had been surrendered to the stronger in arms, it was within his right and discretion to say what part thereof he purposed as victor to keep and in what to mulct them. Livy, bk. 44.

Such was the treaty which was granted to Æneas after he had fled from Troy and was begging for peace from the pursuing Greeks. The terms were that Æneas and his allies and all the property which they had carried off with them should quit Trojan soil within a specified time and that their fortresses should be delivered into the power of the Greeks. Dion. Halic., Rom. antiq., bk. 1.

Another example is the treaty made by the Romans with the Æquians, the conditions of which were: The Æquians, retaining their territory intact, are to become subjects of the Romans; they are to send nothing to the Romans save troops as often as summoned and then at their own expense. Dion. Halic., Rom. antiq., bk. 9.

Such also was the treaty which the Apulians obtained from the Romans, for they did not enter into it on equal terms (as Livy says), but as being under the sway of the Roman people.

Of the same class, too, is the treaty in which Philip was bidden to withdraw his guards from all the towns of Greece, to surrender his fleet and elephants, and to pay a thousand talents to the Roman people, and was forbidden to make war outside Macedonia without the Senate's authorization. Livy, bk. 43.

So also was the treaty by which Antiochus, after the whole of Asia this side of Mount Taurus had surrendered to the Romans, was to hand over his fleet and its equipment and pay twelve thousand Attic talents, over twelve years, by equal instalments.

Livy, bk. 48.

The second class of treaty was that in which combatants of equal strength in war entered on equal terms into a treaty of peace and friendship.

Such was that which we read of as struck between Romulus and Tatius, King of the Sabines; there had been three drawn battles between them, with very great slaughter on either side; so the wives of the Romans, who were of Sabine origin and about whom the war had arisen, intervened, and the combatants elected to end the war by a treaty rather than by fighting; this treaty provided that Romulus and Tatius should reign jointly in the City with equal power and honor and that the rights of Roman citizenship should be given to the Sabines.

Dion. Halic., Rom. antiq., bk. 2.

Now in this kind of treaty it is usual to arrange on equal terms for mutual return of prisoners, restoration of towns and the like; accordingly in the treaty between Octavius Cæsar, Antony, and Pompey it was agreed that there should be a cessation of hostilities by land and by sea and that the contracting parties might freely come and go everywhere; also that Pompey should withdraw his garrisons from every place in Italy, that he would not receive any more fugitive slaves, that he should rule over the islands of Sardinia, Sicily, Corsica, and the others which were then in his possession, and receive the Peloponnese into the bargain, and that Cæsar and Antony should possess what was left.

Dig. 49, 15: 12, (pr., and 20).

Appian, Civil war, bk. 5.

And of this kind, too, the treaty seems to have been in which the Romans granted peace to the Ætolians, upon the following conditions: The Ætolians are to recognise the empire and superiority of the Roman people without fraud and are to have the same enemies as the Roman people, bearing arms and making war upon them side by side. For, although the treaty in question can not be called one on equal terms, yet it was not a case where conditions were imposed on the vanquished or they were deprived of anything, but they were left in the free enjoyment of their own laws.

Livy, bk. 48.

Dig. 49, 15, 7.

Again, the third class of treaty was that in which peoples who had never been enemies knitted themselves together by a bond of alliance and entered into a compact of friendship. It is not usual for peoples in such a case either to impose or to receive conditions (for that would be between conquerors and conquered), but they framed certain conditions for the alliance and friendship on which they were entering. Such was the treaty which Latinus made with Æneas, when the Trojans were admitted into a part of his territory. He bargained that they should coöperate with each other in the war which they were preparing to wage against Rutilus and that each would assist the other to the utmost of his strength.

Dion. Halic., bk. 1.

This is also the place to mention the treaty in which friendship was inaugurated with the Latins, during the consulship of Postumius Cominius and Spurius Cassius; for, though it appears, from Dionysius of Halicarnassus, that the Latins had formerly been subject to the Roman sway, nevertheless the faithful services which they rendered to the Romans led to their being subsequently united to them by a treaty of alliance, which ran as follows: "Let there be a mutual peace between the Romans and all the peoples of Latium so long as heaven and earth stand fast, and let neither make war on the other or bring enemies from any direction upon him, and let them not afford safe passage to invaders; let each render aid with all his might to the other when molested by war and let them share booty and spoils equally." These same Latins, however, repeatedly renewed war in subsequent years and were at length crushed by Camillus and reduced into the power of the Roman people.

Bks. 3 and 4.

[2] A treaty can also be classed here by which some province or city places itself under the guardianship and protection of some foreign prince or joins some kingdom or republic on specified conditions. For, as Proculus ruled, it remains a free people whether the treaty of friendship is drawn on equal terms or whether it includes the formula that the people in question consents to a courteous recognition of the superiority of the other people. For the object of the addition of this formula is to show that the one people is superior to the other, but not that the latter is unfree; and that is the force which Cicero attributes to the clause "majestatem comiter conservare," which was common form in Roman treaties.

Dig. 49, 15, 7. Doctors on Dig. 13, 7, 4. Franc. Ripa, Consult. 55. Socin (grandson), consult., 6, p. 1.

Orat. pro Corn. Balb.

This third kind of treaty can be divided into two kinds according as the treaty is a purely defensive one or is both offensive and defensive (to employ the current phraseology), i. e., is designed both for resisting and for making war, and this can be framed either so as to refer to all the rest of the world, so that the allied peoples have exactly the same enemies and the same friends, or it may be made with specified exceptions.

With this class may also be grouped treaties the object of which is purely commercial and which provide free ingress and egress for merchants and which can exist even between enemies.

[3] It was, however, a principle of the Romans never to enter into a treaty with an armed enemy, nor were they wont to exercise over any even a peaceful rule, unless they had made surrender of everything, whether divine or human, and had admitted a garrison or, lastly, were bound by an alliance or a treaty. For it was ever a matter of strict solicitude with the Romans, not to give the appearance of submitting to demands under hostile pressure. Accordingly, the consul Spurius Cassius told the envoys of the Hernicians, when they asked for peace, that they must first comport themselves in a manner befitting a beaten and

Dion. Halic., bk. 8.

subjugated people and that only so could they make their requests for friendship.

Dion. Halic., Rom. antiq., bk. 8.

The consul Titus Largius, too, told the Fidenati, when they applied for a truce, that before they could get an audience they must lay down their arms and open their gates, and that apart from so doing they had nothing to hope for from the Roman people in the way of peace or truce or anything else of a humane and moderating character. So, also, after the consul Albinus had been put to flight with heavy loss, Pyrrhus so much admired the Romans because they made no mention of a peace that, although he was the conqueror and had received large reinforcements, he made the first advance and proposed peace on quite equal terms, with liberation of prisoners, and offered the Roman people his help in the subjugation of Italy, and all he asked in return was safety for the Tarentines and their friendship for himself. The answer, on the advice of Appius Claudius Cæcus, ran, that Pyrrhus must first quit Italy and that then, if it suited him, he might treat for friendship and alliance, but that as long as he remained under arms the Roman people would fight him, even if he had beaten a thousand Albinuses.

Dion. Halic., Rom. antiq., bk. 5.

Plut., Life of Pyrrhus. Val. Max., bk. 8, ch. 13. Cic. on Old age.

In the same way, when the Ætolians sought peace, the consul Marcus Fulvius replied that he could not entertain any suggestion of peace from them until they were disarmed and that they must begin by surrendering all their weapons and horses and then pay a thousand silver talents to the Roman people.

Livy, bk. 48.

And when Vermina, son of Syphax, sent a mission to beg that he might be styled king and their ally and friend, the answer was that he must sue for peace from the Roman people before he could be styled king and their ally and friend.

Livy, bk. 51.

[4] Again, arrangements such as we have been considering are not always made by treaty, but sometimes also by sponsion. The following passage from Livy shows what the difference was between the two:

"When the consuls went to Pontius to confer with him, he began to talk about a treaty in the strain of a conqueror; but they declared that such could not be concluded without an order of the people, and the ministry of the fecials, and the other customary rites. Accordingly, the Caudine peace was not effected by a treaty, as is commonly thought, and asserted by Claudius, but by a sponsion. For what occasion would there be either for sureties or hostages in the case of a treaty, where the business is effected by the imprecation, 'Whichever nation shall cause the said terms to be violated, may Jupiter strike that nation even as the pig is struck by the fecials'? Now the consuls, prefects, legates, quæstors, and military tribunes became sureties in this case, and the names of all the sureties are preserved; whereas, had the business been transacted by a treaty, none would have appeared but those of the two fecials. Further, on account of the delay necessitated by the treaty itself, six hundred

horsemen were demanded as hostages, who were to suffer death if the compact were not fulfilled."

Now, just as the sovereign prince alone may set warlike enterprise on foot and make war and collect an army and summon a levy, so also the opposite matters of making treaties and truces with the enemy are functions also reserved to the sovereign, as we have shown above. Dig. 48, 4, 3 and above, on just war.

[5] Accordingly, a peace can not be set up by generals without the consent of the prince or people in whose behalf and under whose management the war is being waged. In olden days this was provided for by the fecial law and later by the *Lex Julia* about the provinces and the *Lex Cornelia* about treason. For, without authorization by the people and initiation by the Senate (all whose power has been transferred to the prince) nothing could be solemnized so as to bind the people. And indeed if, in civil and forensic business, an agent who has been appointed with general authority to carry on an action has no power to compromise and settle the case, it follows that one who has been appointed to the command of an army in order to carry on a war exceeds the limits of his functions if he makes peace with the enemy, and such excess was always considered an extremely grave blunder in military matters. Cicero against Piso. Dig. 1, 4, 1. Cic. pro Corn. Balb. Dig. 3, 3: 60 and 63. Dig. 49, 16, 3, 15.

It was on that account that the Senate refused to ratify the peace of Caudium made by Titus Veturius and Spurius Postumius, and the treaty concluded by Caius Mancinus with the Numantines. And in just the same way the dictator Camillus repudiated the agreement entered into between Sulpicius, a former military tribune, and Brennus, the Gallic chieftain, by which it was agreed that the Gauls should receive a thousand pounds of gold from the Romans and raise the siege. The refusal of Camillus was based on the ground that the agreement had been made by an inferior magistrate subsequently to his own appointment as dictator and without his authorization; for the dictator exercises sovereign power. Livy, bk. 4. Pompon. in Dig. 1, 2, 2.

And Sallust, speaking of the agreement made between the Roman general Aulus and Jugurtha, King of the Numidians, said, The Senate decreed (as was correct) that no treaty could be made without the joint consent of the people and itself.

From the foregoing it is clear that no one can, apart from the prince's authorization, come to terms with an enemy without committing the offense of treason, for this is a matter of sovereign prerogative. On this ground more than on any other Bodin thinks that the execution of Louis, Duke of Orleans, was justified, because he had made a treaty with the Duke of Lancaster without authority from the King of France. Accordingly, I can not agree with Duarenus (whom others follow) when he declares that the opinion just cited is sound in the case of one who has only been intrusted with the business of leading and governing the army, but unsound in the case of one who has been invested with full and free power over everything. Dig. 2, 14, 5. Repub., bk. 7. On Dig. 2, 14, 5.

Duarenus holds that the latter person has even the power of making peace with the enemy; but I can not admit this. For matters of public and royal right rest on a different basis from that on which private rights rest and they can not be shared with private persons, as was shown in an earlier chapter. And so, no matter how full and free be the general power which is allowed to a commander, I do not think that the power of making peace with the enemy is meant to be granted to him, for matters of royal prerogative do not pass under general words, but require nothing less than an express and special grant.

By inference from Dig. 3, 3, 58 and Cod. 1, 50, 2. And Bartol. thereon, and on Dig. 32, 1, 2.

Dig. 1, 1, 1, 2; and 2, 14, 5. Connanus excellently, bk. 5, ch. 1.

Leading text in c. 4, X, 1, 30, and in Dig. 1, 21, 1—the Doctors also—and in Feud. law, ii, 56. Molin. on custom of Paris, tit. 2, sec. 1, Gloss. 5. Text in Dig. 49, 14, 30.

Now in this case if the commander or general has received an express grant of power to solemnize a treaty (which would be very unusual), he can not go beyond his mandate or delegate his power to another, for he has not got it in virtue of his magistracy and command, but he has a mere right of proceeding under the law and therefore (in Julian's words) he does not do anything of his own right, but in right of him who gave the mandate. For, as already said several times, the power of peace and war resides in the sovereign and can not be transferred to another.

Dig. 1, 21, 3.

And so, beyond question, when the Roman consuls, in whose hands the highest authority was lodged, took command of an army, they had indeed power to carry on war and to harass and attack the enemy at their discretion and also autocratically to control military discipline, but the making and the ending war, apart from the authorization of the Senate and the command of the people, were beyond them.

Bk. 40.

Accordingly, the phrase employed by Livy is that the Senate, on the command of the people, decreed that Publius Scipio, subject to the opinion of the ten envoys, should make peace with the people of Carthage on such conditions as seemed good to him. Similarly, full discretion with regard to peace and war with Philip was intrusted to Titus Quintius. So also peace was granted to the Etruscans on such terms as the consul Lucius Æmilius should think best, and to the Æquians at the pleasure of the consul Quintus Fabius. And we read that this was a frequent practice of the Romans, for they were well aware that no one was better able than a commander to form a correct estimate of the intention with which proposals of peace were made and of the general position of affairs.

Livy, bk. 42.

Dion. Halic., Rom. antiq., bk. 9.

On Dig. 2, 14, 5.

[6] Now it has been generally held that the doctrines which have been laid down about peace apply equally to truces, although Bartolus dissented on the ground that this is to make a departure from the analogy of mandate, as in the foregoing case, seeing that in civil business an agent is not allowed to give one's opponent an extension of time for payment any more than he is allowed to make a compromise with him.

Dig. 45, 1, 122, 1. Duaren. on Dig. 2, 14, 5.

And this is the view I myself take, so far as truces of long duration are concerned, which are rather by way of putting an end to the war—a

function reserved to the sovereign—than procuring a cessation of hostilities. We read accordingly that truces of that kind were never granted by the consuls and other Roman commanders, but by the Senate and the Roman people. Thus the Samnites, after their defeat, obtained a truce for two years instead of the treaty which they were suing for. In the Livy, bk. 9. same way truces for several years were granted by the Senate and the people to the Veians, the Volsinians, the Æquians, and a great many others. Livy, bks. 2, 4, 7, 9, and 10.

I hold, however, that it is competent for generals to make with the enemy that variety of truce which takes effect at once and holds good for a short time only, putting a stop to attacks on both sides—and this is the variety that Paulus deals with—and my reason is that these truces do Dig. 49, 15, 19. not put an end to the war; for though the fighting stops, the war continues. This is especially the case where the truce is rendered desirable Gell., bk. 1, ch. 25. by some crisis or is otherwise necessary or expedient. For the grant of authority to a general to harass and attack the enemy at discretion gives him competence in all administrative matters which concern the war.

Roman generals, accordingly, were wont of their own authority, when the enemy sought for peace, to grant a truce during which envoys might be sent to Rome to prefer the request for peace. And so Scipio allowed the Carthaginians a truce for three months, during which their envoys might treat for peace at Rome. And the same thing happened Livy, bk. 40. when Libo and Bibulus, of the faction of Pompey, were stationed with their fleet at Oricum and found themselves reduced to great straits through lack of necessaries. They expressed a wish to discuss matters of great moment with Cæsar, giving the impression of being about to suggest an arrangement; and they obtained a truce for the time being from Marcus Acilius and Statius Murcus, Cæsar's representatives—the one of them was in charge of the town-walls and the other of the land-garrison—for the proposals made were of obvious importance and such as Cæsar was known to be very desirous of receiving. Caes., Civil war, bk. 3.

Further, generals have, not infrequently, themselves laid down the conditions of peace and then, when these have been favorably received by the enemy, have granted a truce to allow of envoys being sent to Rome to submit the question of peace to the Senate. This was the course adopted, with much success, by Scipio in the case of the Carthaginians; Livy, bk. 40. and it was on his initiative, too, that his brother, Lucius Scipio, after the defeat of Antiochus, proffered terms of peace and allowed the despatch of an embassy to Rome about the matter. Titus Quintius, also, granted Livy, bk. 47. a truce for six months to Nabis, tyrant of Sparta, to allow time for the confirmation by the Senate of the terms of peace laid down by himself; Livy, bk. 44. and on another occasion he granted a truce for two months to Philip and allowed him to send a mission to Rome to treat about the terms of peace which they had already been discussing. And the Senate would often Livy, bk. 42.

follow the advice of a general in granting or refusing a peace which the enemy sought, as just said.

There have been peoples, however, who have not allowed their generals so much latitude. We read, accordingly, how a truce for four months had been agreed on between Agis, King of Sparta, and Thrasybulus and Alciphron, Argive generals; but on the proposal of Alcibiades the Argives refused to ratify the agreement and the Spartans also treated it as null. And Thucydides tells us that this episode made the Spartans so angry with their king that a law was introduced providing him with a body of twelve counsellors, apart from whose advice no truce or treaty of any kind could be entered into with the enemy. It is, however, notorious that the kings of Sparta had no sovereign power and no unfettered discretion.

Dion. Halic., bk. 2. Bodin, Method. hist., ch. 6.

[7] But now, suppose that a prince who has received from his people a grant of all their power and sovereignty, makes a proper and expedient agreement touching a matter of State concern—whether a peace or some other treaty made with the enemy—the question has been raised by jurists whether in thus making peace with the enemy he can condone all private hurts and losses sustained by reason of the war and even make a grant to the enemy of the property of his subjects.

Dig. 1, 4, 1. Dig. 2, 14, 5. Dig. 2, 14, 5, and Cod. 7, 37, 3.

Now no doubt can arise with regard to things captured by the enemy during the war, because the law of war vests these in the enemy, quite apart from any agreement with the prince, and the same holds, too, of hurts and losses caused under the laws of war. But what about other things which have not been acquired by the enemy or which have been seized by an "unjust" enemy? They, too, can be taken from their private owners and granted to the enemy if no other measures can be adopted to secure public safety, for public safety must come before private advantage, or (as Pliny puts it) public interests must be preferred to private, and eternal interests to mortal. This is the idea underlying the remark of Tacitus that every great achievement contains an element of injustice in so far as public gain is relied on to counterbalance private loss. And so, when Thrasybulus had freed Athens from the excesses of the Thirty Tyrants he had a *plebiscitum* (decree of the people) enacted to prevent the raking up of bygones; and this forgetting of wrongs (called in their tongue ἀμνηστία) reestablished the shaken and tottering State in its original position. And Cicero thought that this was an example which at times might well be followed at Rome with the object of furthering the public peace.

Fern. Vasq., bk. 1, ch. 4. Authentica, Res quae, Cod. 6, 43, 3 (Nov. 39, 1). Epist., bk. 7. Dig. 17, 2, 65, 5. Cod. 6, 51, 16. Val. Max., bk. 4, ch. 1. Philipp. 1.

And this is, admittedly, more than ever necessary in the case of property which has been wrongfully taken possession of and enjoyed for a considerable tract of time, for if such property were taken out of the hands of its possessor and restored to the original owner there would inevitably be a great upsetting and disturbance: and this was the very

sound opinion which, in a not dissimilar instance, the Emperor Trajan embodied in a rescript when consulted on the point by Pliny. But otherwise, and except in cases of imperative necessity and where great advantage will accrue to the State, a prince may not take his subjects' property away from them; so to do would be repugnant alike to natural and divine law.

Pliny's Epist., bk. 10.

Dig. 12, 6, 14; and 40, 9, 17.

[8] For, however much a prince may be freed from the yoke of the law, yet all kings and princes (as Pindar said) are subject to the law of nature; and ample as the power of a prince may be, yet it does not extend to acts of injustice; and what Pliny wrote to Trajan is in point in this connection: " Just as it is the essence of happiness to be able to do as much as you want to, so it is the essence of greatness to want to do just as much as you can." Rescripts of princes, accordingly, ought to receive such an interpretation as will enable them to be carried out without detriment to others and those which are in conflict with the rights of another are invalid. Accordingly, the gift of the duchy of Milan, made by the Emperor Maximilian to King Louis XII of France, led to war, because of the right which the Sforzias asserted to that duchy and which the Emperor is not taken to have intended to give, nor could he.

Dig. 1, 3, 31.

In Panegyr.

Dig. 43, 8, 2, 16. Cod. 1, 19, 7. Cod. 1, 19, 2.

Bodin, Repub., bk. 1, ch. 9.

[9] For, however much kings may be styled lords of all, this is to be interpreted as referring to sovereignty and power and not to ownership and possession, which are matters affecting private parties. And this was neatly put by Seneca, where he says, " Power over everything belongs to kings, and to individuals property." Or a little later: " The king possesses everything in sovereignty, individuals possess everything in ownership; for everything is in the sovereignty of Cæsar, but what is owned by individuals is in their patrimony."

Dig. 6, 1, 23; and 41, 1, generally. Bk. 7, ch. 4, and ch. 5, de benefic.

And Cicero tells us that Aratus of Sicyon deservedly gained much praise on this ground. He had freed his country, which for fifty years had been in the hands of tyrants, by the overthrow of the tyrant Neocles, and had restored large numbers of exiles; now the property of these persons had got into the possession of others, and Aratus found that much of this property had for a long time been enjoyed by right of inheritance, and much by right of sale, and much by right of dowry; and that on the one hand it could not be taken away from the possessors without inflicting wrong on them, and that on the other hand the former owners would be dissatisfied. So he obtained from King Ptolemy the help of a large sum of money and joined to himself a council of fifteen notables, with whose assistance he examined the cases, both of those who were in enjoyment of the property of others and of those who had lost the possession of their own property; and in the end he succeeded, by assessing the money value of this property, in persuading some to prefer to take cash and cede their property to its possessors and in persuading others to think it better to be paid a money equivalent than to reclaim

Offic., bk. 1.

their property. The upshot was that harmony was established and that all went off without complaining.

In like manner Brutus and Cassius, after Cæsar's death—seeing that it had been resolved that his acts should be ratified by the State—ordered that the former owners of lands of which they had been deprived by Sulla and Cæsar in the civil wars should at any rate be paid a price therefor out of the public funds. Thereby these persons were appeased and others were made more secure in their possessions.

Appian, Civil war, bk. 2.

[10] One further question remains, whether on the death of a prince with whom a treaty has been struck, the treaty subsists with his successors. Now as regards other contracts it is held that a distinction must be drawn according as the succession passes by way of inheritance—in which case the successor is by the very fact bound by the contract of the deceased—or under some statute or by election, in which case he has not to answer for what was done by the deceased. For a personal obligation does not extend to any other successor than an heir, not even if a man has expressly promised for himself and his successors.

Cod. 3, 32, 14.

Dig. 18, 1, 51, 1; and 36, 1, 1, 16. Cod. 4, 16, 7.

Dig. 45, 1, 38.

As regards treaties, however, and other public agreements into which a man enters not on his own behalf, but on behalf of the State (which is just as effectually represented by subsequent officials as by those of to-day), we must declare that a prince is entirely bound by his deceased predecessor's contract and that the parties to the treaty continue to be subject to it. The Veians and the Fidenates, therefore, in the reign of Tullus Hostilius, had not any just cause for reopening the war; nor had the Latins who, in the reign of Tarquinius Priscus, assumed that the death of Ancus had freed them from the bond of the treaty; nor had the Etruscans who, on the death of Tarquinius Priscus (to whose power they had submitted themselves) declined to abide by the terms of the treaty any longer. And the Romans were quite justified in declaring war on Perseus when he gave out to their envoys that the treaty made with his father Philip had nothing to do with him.

Dig. 5, 1, 76.

c. 1, X, 2, 9, and doctors thereon. And c. 59, C. 16, qu. 1. Jason and others on Dig. 1, 4, 1, col. 3. Note on c. 4, X, 5, 4.

Dion. Halic., Rom. antiq., ch. 3 and 4.

Livy, bk. 42.

It is, however, the general opinion that if such a treaty is a cause of very great injury to the State, the succeeding prince is not bound by it. Herein I agree, provided that the treaty relates to the transfer of something appurtenant to the royal crown and has been made without the requisite consent of the people or estates, or if the treaty derogates from the royal prerogative, for the deceased prince would not be competent to effect this; and such a treaty would be quite devoid of force right away from its inception.

Cyn. and doctors on Cod. 1, 14, 4. Bald. on Feud. law, c. i, 7.

c. 1, X, 3, 10. And c. 20, C. 12, qu. 2. And generally in Joan. Papon., Arrest. 5, 10.

c. 20, X, 1, 6.

Above, ch. 6.

From the foregoing it is clear that the most effective treaties are those which are entered into on both sides by both king and people. This is illustrated by the reply of the Hernicians when Roman envoys made expostulations about their wrongdoings and robberies. The reply was that no treaty had ever been made between themselves and the Roman

people, and that the treaty made with King Tarquin was in their opinion at an end by reason of his exile and death. So also when Edward IV of England, after his expulsion from the throne, sought aid from the King of France pursuant to a treaty: the answer came that the old treaty was between king and people on either side and that, therefore, after Edward's expulsion, the treaty remained in force with the people and the then reigning king. But when the exiled Tarquins made war on Rome, the Latins refused to help either side on the ground that their oath forbade them to make war alike on the Tarquins and on the Romans, seeing that they were equally bound to both sides by the treaty.

Dion. Halic., ch. 8.

Bodin, Repub., bk. 1, ch. 7.

Dion. Halic., bk. 5

Chapter VIII.
Of trickeries and deceit in war.

1. Trickeries are permissible in warfare.
2. What is permissible deceit.
3. Stratagems are praiseworthy in a general.
4. The old Romans disdained all deceits.
5. The ancients sometimes found the mere reputation for untarnished good faith more useful than arms.

c. 2, C. 23, qu. 2. [1, 2] In the conduct of war, says St. Augustine, it is indifferent from the standpoint of justice whether the fighting is all open and above-board or whether trickery be used. And Ulpian declares that it is permissible deceit (what the ancients understood as shrewdness) to devise Dig. 4, 3, 1, 3. contrivances against an enemy or a brigand. Accordingly, that excellent general, Lysander, used to say that where lion-skin ran short fox-skin Plut. in Apophth. must be patched on. And the poets feigned that Hercules carried instead of arms the skin of the Nemæan lion and arrows dipped in the gall and blood of the Lernæan Hydra, as if to show that a good commander ought to make use at the same time alike of cunning and of bravery; and that is the purport of Virgil's

> Dolus an virtus, quis in hoste requirat?
> (Guile or valor, what matters it in an enemy's case?)

And this is a correct idea, provided the claims of good faith are re- c. 3, C. 23, qu. 1. spected, for we ought not to be like the tyrant Dionysius, who used to Plut. On fortune and valor of Alex. say that boys are duped by dice and men by oaths; or to copy the Persians, who paid no heed to good faith, both in words and in deeds, save Justin, bk. 12. so far as it suited them. On the other hand it is recorded that Joshua Joshua, 8. laid an ambush for his enemies on the command of God himself.

And praise has been awarded to the stratagem of Pittacus of Mitylene (one of the seven wise men), which was as follows: He was entering on a contest with Phryno, an Athenian general, who had a little figure of a fish on his helmet, and so he took a net out into the arena and, saying that he was going a-fishing, he coiled the net round Phryno in such a way that he could not free himself and then slew him.

It was, therefore, a just remark of Agesilaus that, while the breach of a pledged word was impious, it was not only quite right to deceive an Plut. in Apophth. enemy, but pleasing, too, and profitable. And in Xenophon we have Cambyses replying to Cyrus' question, "What was the best way to secure victory," that in the quest of victory the foe must be trapped in every possible way, and tricked by hidden snares and guile and fraud, and worn

down by theft and rapine. Thus an opportune lie on the part of a general has sometimes given him the victory, as in the case of that lie of Valerius Levinus who, having his sword bloody with the slaughter of a private soldier, shouted out that he had slain Pyrrhus and thus caused such consternation to the Epirotes that they fled to their camp with all speed, panic-stricken and weeping. In the same way when the consul Titus Quintius was fighting with the Volscians and his men were giving way, he resorted with success to a falsehood and cried out that the enemy were in flight on the other wing, and thus he got his men in hand again, led them to the attack, and conquered those who imagined they were conquerors. Livy, bk. 2.

[3] Indeed, stratagems of this kind bring as a rule very great praise and glory to a general. Now in this fashion of plotting and tricking Philip of Macedon was reckoned an adept, for he took much more pleasure in outwitting an enemy by a ruse than in beating him on the open field, saying that a victory won by guile and cunning never cost any lives of his soldiers, while that kind of victory which comes from the foughten field is ever a bloody one. The Carthaginians, too, and pre-eminent among them Hannibal, and the Greeks plumed themselves on their skill in such trickery and deceit, and no blame would have been imputable to them had they not at the same time made so little of breach of faith.

[4] Those old Romans, however, disdained all such frauds and deceptions and had no wish to conquer save by sheer valor and downright force—what they used to call Roman methods. But the Romans of a later day discarded this maxim of their ancestors and were quite ready to call the arts of dupery and deceit to the aid of themselves and the State. And so when Quintus Martius and Aulus Attilius returned from the mission on which they had been sent to Perseus, King of Macedonia, they made it a matter for especial boast in the Senate that they had fooled the enemy by means of a truce and the hope of peace, for his preparations for war were so complete, as contrasted with their own utter unpreparedness, that he could have occupied all points of vantage before their army could be transported into Greece; if, however, the period of the truce were utilized he would lose all his superiority in preparedness and the Romans would begin the war better fitted out in all respects. Livy tells us that the majority of the Senate approved of this Bk. 34.
as a sound bit of business; but these novel tactics found less favor with the greybeards, who called to mind the usage of days gone by; they failed (said they) to recognize Roman methods in this embassage, declaring that their ancestors' manner of warfare was not by ambushes and nocturnal fights, nor by simulated flights and sudden returns upon an incautious foe, nor by vaunting craft rather than true valor; and that they were wont to declare war before waging it, nay to do so with all solemnity by messengers, and sometimes to indicate the precise spot for

conflict. It was (said they) this same good-faith that informed Pyrrhus of his doctor's plots against his life and that sent back in chains to the Falisci the betrayer of the king's sons. These (said they) were the Roman methods, alien alike to the slyness of the Carthaginians and the cunning of the Greeks, who deemed it a proud thing to overcome an enemy by craft rather than by force, and even if at the present day guile may seem occasionally more profitable than valor, yet you have finally conquered an enemy's courage only when you have extorted from him the acknowledgment that he has been beaten in a just and righteous war by no trickery or chance, but in a hand-to-hand measurement of strength. This, as Livy tells us, was the contention of the greybeards, but it did not prevail.

[5] We find on record, however, that the Romans of olden time sometimes found the mere reputation for downright valor and untarnished good-faith more useful than their unconquered arms. The story of Camillus furnishes a striking illustration of this; for at the siege of Falisci, which promised to be of indefinite duration, his surrender of the schoolmaster who was betraying the sons of the Faliscan nobles and his declaration that he had no wish to conquer save by Roman methods—Bk. 5. valor, toil, arms—impressed all ranks of the Falisci (as Livy narrates) with such respect for Roman good-faith and for the general's justice that, by common consent, a mission was despatched to the camp of Camillus, and thence by his permission to the Senate at Rome, to surrender Falisci. And when the mission was introduced to the Senate it is recorded that its address contained the following passage: "The issue of this war bequeaths two salutary examples to the human race. You preferred to keep faith in war rather than gain a present victory; we, stirred by your good-faith, spontaneously offered you victory."

So, also, Fabricius overcame Pyrrhus with an equal display of virtue, though he could not get the better of him in arms, for he surrendered to Pyrrhus a doctor who was plotting against his life; and when Pyrrhus sent back to him some prisoners of war gratuitously, he declined to accept the gratuitous favor and himself sent back just the same number, so that there should be no appearance of payment for his good deed and because the Romans, who had not been prompted by any special favor towards Pyrrhus, wished to avoid the imputation of compassing any one's death by guile and of securing in that way a victory which they were powerless to gain in the open field. And this act of Fabricius was highly praised by the Senate, who esteemed it a great scandal and disgrace to overcome any one with whom they had an honorable contest, Plut. in Apophth. not by valor but by crime.

Cic., Offic., bk. 3. The case of Saul and David is parallel: They were fighting one another and David had repeated opportunities of destroying Saul, unpremeditatedly and without any trouble, but he would not do so, vowing

that he would not stretch forth his hand against the Lord's anointed unless Saul should happen to descend into battle and perish or the Lord should smite him. 1 Sam., ch. 26.

Further, the conduct of Quintus Servilius Cæpio was much reprobated in that he made away with Viriatus by fraud and snares and domestic assassins, so that he was said to have trafficked for a victory rather than to have gained one. Val. Max., bk. 9, ch. 7. L. Florus, bk. 2, ch. 17.

The reputation of Fabius Maximus as a consummate general rests, moreover, not on any employment of deceit, but on his skill in concealing his plans and in lying quiet and dissimulating and laying ambushes and anticipating the plans of the enemy. Cic., Offic., bk. 1.

Chapter IX.
Of the law of ambassadors.

1. Ambassadors inviolable.
2. Usual to surrender to the enemy one who assaults an ambassador of the enemy.
3. Ambassadors can not go beyond the scope of their embassy.
4. The law of ambassadors only obtains in the case of "enemies."
5. A rebel is not inviolable even if employed on the business of an embassy.
6. The despatch of an embassy to rebels is unbefitting the king's majesty.
7. Wisdom and dignity to be displayed by ambassadors.
8. Embassies sometimes intrusted to women.

[1] Ambassadors were safe and inviolable among all peoples. Dig. 50, 7, 18 and c. 9, Dist. 1. This was provided by the law of nations. The word *sancti* was used of them by the Romans, it being derived from the tufts of herbs (*sagmina*) which the ambassadors of the Roman people used to carry—just as the ambassadors of the Greeks used to carry what were called *κηρύκεια* Dig. 1, 8, 8. (wands), as Marcian tells us.

[2] Any one, therefore, who had assaulted or injuriously treated Dig. 50, 7, 18. an ambassador of the enemy was ordinarily surrendered to the enemy, a proceeding which, as we have said, was secured by fecial law. Thus, in the consulship of Marcus Æmilius Lepidus and Caius Flaminius, for laying violent hands on the ambassadors of the Carthaginians, Lucius Minucius Myrtilus and Lucius Manlius were surrendered by the fecials to the ambassadors at the bidding of Marcus Claudius, the urban pre- Livy, bk. 38. fect, and were carried off to Carthage. And Quintus Fabius and Cnæus Apronius, ex-ædiles, for assaulting the ambassadors who had been sent to Rome by the city of Apollonia, in the course of a dispute which had Val. Max., bk. 6, ch. 6. broken out, were forthwith surrendered by the fecials. And, indeed, if those who had violated the ambassadors had not been surrendered, or if the violent act had been planned by the State, custom would have justified a declaration of war.

The Romans, accordingly, made ruthless war on the people of Fidenæ for slaying the Roman ambassadors at the bidding of Tolum- Livy, bk. 4. nius, King of Veii, to whom they had defected; and also on the people of L. Florus, bk. 2, ch. 5. Illyria in return for the beheading of the Roman ambassadors. David, too, made war on the King of the Ammonites in return for the outrage 2 Sam., ch. 20. upon his ambassadors. For an outrage offered to ambassadors is deemed c. 15, end, C. 2, qu. 7, and 2 Sam., ch. 10. offered to the king or State whose embassage they are carrying out. Nay, although, on a sudden outbreak of war, those who are found among either people may be enslaved by their enemies, even when they Dig. 49, 15, 12, 1. came in time of peace, yet (so Pomponius ruled) ambassadors continue

free, and this agrees with the law of nations. And, of a truth, these concessions to ambassadors are made with the utmost reasonableness, in order that representatives of each side may be in a position to treat with safety about the terms of a peace or a treaty or a truce. They frequently lay very big controversies to rest by means of a little labor. Dig. 50, 7, 18.

And so the Romans attached to the law of ambassadors an exceptional degree of inviolability over and above that which they attached to the laws of war and peace. This was carried to such a pitch that Scipio Africanus let go unharmed a vessel loaded with many illustrious Carthaginians, which had fallen into his power, because these persons declared that they were ambassadors sent to himself—and this although it was clear that they had falsely assumed the style of an embassage in order to escape a danger. Scipio, however, preferred it to be adjudged that the good faith of a Roman general had been abused rather than that it had been invoked in vain. Val. Max., bk. 6, ch. 6.

A similar thing happened after the expulsion of Tarquin from the throne. His ambassadors had come to Rome to claim some property of which he had been despoiled and entered into secret negotiations with some young nobles with a view to the restoration of the king; the thing was detected. Although their conduct was such as to rank them with enemies, yet (in Livy's words) the law of nations prevailed. A similar thing happened when the Volscians despatched certain spies in the guise of ambassadors to the Roman camp, in order to spy out their number and warlike equipment. Convicted and confessedly guilty as they were, yet the dictator Postumius saved them harmless from the mob that had been roused up to attack them. He made this concession to the mere empty name of embassage, lest perchance the enemy should be furnished with some honorable pretext for war by feigning that violence had been offered to their ambassadors in breach of the law of nations. Bk. 2. Dion. Halic., Rom. antiq., bk. 6.

[3] I do not, however, think that this case provides complete legal safety for ambassadors who comport themselves similarly, seeing that ambassadors may do nothing outside the scope of their embassage. Accordingly, the conduct of the Gauls, on the occasion of their attack on Clusium, was correct. The Fabii, who had been despatched as Rome's ambassadors to require the Gauls not to molest her allies of Clusium, took up arms, after the termination of their mission, and, in defiance of the law of nations, actively joined the battle-array of Clusium. When the Gauls saw this, they sent an embassage to Rome to complain of the outrage and to demand the surrender of the Fabii on the ground of their violation of the law of nations; but so far were they from obtaining it that they heard that the very men whose punishment was being mooted had been appointed military tribunes for the following year. Burning with anger at the honor wantonly done to the violators of human law and at the indignity offered to their embassage, the Gauls passed by Dig. 50, 7, 9, 2.

Clusium and made straight for Rome and, after defeating the Romans
Bk. 5. on the Allia, took the City and sacked it. And this calamity, Livy tells us, overtook the Romans because of the violation of the law of nations.

[4] It must be further noted that this law of ambassadors, like the other laws of war, holds only in the case of enemies (*hostes*) and not in the case of robbers and rebels and others not covered by the term

Dig. 49, 15, 24; and 50, 16, 118. Philipp. 8.

"enemies" (*hostes*). This has been already mentioned. Chs. 2 and 6. And so Cicero remonstrated against the concession made to the envoy of Antony, to whom access to the City gates ought not to have been allowed, and maintained that his return to Antony ought to be prevented. And the Emperor Theodosius, too, was within his right in throwing into prison the envoy of a certain tyrant who had risen against him. So also the Emperor Charles V, when he threw into prison the envoys of the Duke of Milan, one of his vassals, who was plotting war against him.

Acc. to Bodin, Republic, bk. 1, ch. 6.

[5] Nor will citizens and subjects, who with wicked intent and

Dig. 49, 15, 19, 8.

traitorous design are among the enemy and whom Paulus would class as enemies (*hostes*), receive any protection from the law of nations, not even if they are clothed with the functions of ambassadors; for although they may be classed as enemies, yet the same law does not apply to them as to enemies, as we have elsewhere shown; for they are rebels and unjust (*injusti*) enemies and they can not by any means whatever free themselves from the jurisdiction and power of their sovereign, which bind his subjects all the world over—any more than the slave Barbarius Philippus, who had been appointed prætor at Rome, succeeded in buying his freedom when he was claimed as slave by his master who had followed him up (as Bodin tells us, following Suidas). And the same principle justified the imperial officials in killing Rangonus and Fregosa, vassals of the Emperor Charles V and ambassadors of the King of France to the Turk, although this was done without the Emperor's orders.

Above, on just war and on keeping faith with an enemy.

Dig. 40, 9, 6. Cod. 4, 61, 4. And c. 2, bk. 1, 2 in vi.

Dig. 1, 14, 2.

Bk. 1, ch. 6.

[6] Now it is utterly unfitting the majesty of a sovereign to send ambassadors to rebels and it was on this ground that Cicero resisted as strenuously as he could the despatch of ambassadors to Antony when he was making war on the Republic; maintaining that, since a citizen and not an enemy was concerned, the situation called for armed coercion and not for verbal demands. Indeed, God himself so abominated rebels and schismatics that when the man of God was sent to Jeroboam (to whom the ten tribes of Israel, abandoning their king, had revolted) to denounce his iniquities, he was forbidden to eat bread with them or drink water, and when he gave not heed, but fed in defiance of the Lord's command, he was visited with the divine vengeance and killed by a lion on his way back. And not only is it unworthy of a sovereign's majesty to send an embassage to rebel subjects, but also extremely hazardous, for it is not to be looked for that the law of nations should be respected by those who are contemning divine and human law.

Philipp. 5. And see above, chs. 2 and 6.

1 Kings, ch. 13, and c. 9, C. 7, qu. 1.

[7] Further, prudence and dignity are prime requisites in an ambassador. For when the Carthaginians sent ambassadors to Rome about peace they failed to obtain it, because the ambassadors who were sent were young and of no dignity and declared themselves unable, by reason of their youth, to remember the contents of previous treaties; and on this ground they were also had in suspicion and the selection of them to demand the ancient peace, which they did not themselves remember, was put down to Punic trickery; but later, when the fortunes of the Carthaginians were at the lowest ebb, they sent Hanno the Great and Hasdrubal Hedus and others of respectable age and dignity to beg for peace at Rome, and then only did the Romans admit that the Carthaginians were really and sincerely treating for peace, and for that reason they granted it. Livy, bk. 30. Appian, Punic war.

Well known, too, is that utterance of Cato about the ambassadors of the Romans who were sent to arrange peace between Nicomedes and Prusias. One of these ambassadors carried disfiguring scars caused by a rock which had in earlier life struck him on the head, and a second limped, and the third was reckoned simple-minded to the verge of foolishness; so that Cato made mock of that embassage and said that it had neither mind nor feet nor head. Appian, Mithridatic war.

Gravity also is at times of much advantage in an ambassador and sternness for the sake of the State. An example was shown by Caius Popilius: Antiochus tendered his right hand to him on his arrival, but he delivered to him the tablets which contained the decree of the Senate charging the King to desist from the war with which he was harassing Pompey; and then, when Antiochus, after perusing these, said that he would take counsel with his friends as to the course he should adopt, Popilius, with the usual asperity of his disposition, drew a circle round the King with a rod which he held in his hand and demanded, "Before you leave this spot give me an answer to take back to the Senate." The King, taken aback by such an overbearing command, replied, after a short hesitation, "I will do as the Senate requires": and only then did Popilius proffer to the King his right hand, as to an ally and friend. Livy, bk. 45. Val. Max., bk. 6, ch. 4.

[8] Sometimes, indeed, embassages have been intrusted to women with the greatest profit and utility to the State. Accordingly during the Sabine war, in the reign of Romulus, a decree of the Senate was made whereby the opportunity was given to those Sabine women who had children at Rome, to go on a legation to the Sabines, leaving their children with their husbands. The head of this embassage was Hersilia, and she arranged peace between Romulus and Tatius, the Sabine king; for this the women received great honors from the kings. Dion. Halic., Rom. antiq., bk. 2.

Again, when Marcius Coriolanus, who had been unjustly punished with exile, in order to avenge his wrongs, approached to the very walls of the city, after the defeat and slaughter of several armies of the Romans, and neither the envoys who had been sent to intercede with him

nor the priests with their sacred fillets could aught avail, his mother Veturia, taking with her his wife Volumnia and his children, won her Val. Max., bk. 5, ch. 4. L. Florus, bk. 1, ch. 22. son over and disarmed him by her entreaties and tears, and so (in the words of Livy) a city which its men could not defend by arms was de- Bk. 1. fended by the entreaties and tears of its women. The Roman people, too, compelled Mutia, the mother of Pompey, by threats to undertake an embassage to him; and, on her initiation and that of Julia his wife, a Appian, Civil war, bk. 5. treaty was struck between Pompey, Antony, and Octavius Cæsar.

And that is noteworthy which we read of the Celts, how that they join their women with them in consultations about peace or war and discuss with their help differences that have arisen between them and their allies—the explanation being that at an earlier date, when a grave and implacable discord had plunged them into civil war, their women flung themselves into the thick of the fight and settled all the disputes with an admirable adroitness and re-established concord. Accordingly, in the very treaty which they arranged with Hannibal, it was provided that if the Celts should have any matter of complaint against the Carthaginians the matter should be dealt with by the Carthaginian generals and prefects in Spain, but that if the Carthaginians should have aught against the Celts, the inquiry into the matter should be conducted before the Plut. on Virtues of women. women of the Celts. But it was wise advice that Marcus Cato gave, to the effect that public audience should not be given to the three orators of the Athenians,—Carneades, Critholaus, and Diogenes,—for he knew them to be of such availing eloquence as that they could persuade to Pet. Crinit., de honest. discipl., 22, 4. whatever course they wished, whether right or wrong.

BOOK THE SECOND

Of the Law and Duties relating to War and of Military Discipline

Chapter I.

Of the duties relating to war.

1. War to be undertaken only for just cause.
2. Lust of power brings many evils with it.
3. Resort not to be had to war, save of necessity.
4. Sometimes victory is a cause of more loss than gain.
5. Good fortune to be borne temperately, bad bravely.
6. The Romans neither elated when victors, nor cast down when vanquished.
7. Two maxims of Plato especially applicable to the duties of war.
8. A brave man will do naught for his own ends, but everything for the commonwealth.
9. By what means the country's interests may be served.
10. To die for the State is honorable.
11. Those are not blameworthy who in war subject themselves to the risk of death.
12. For the good of the fatherland it is lawful to kill one's father or one's son.
13. In war the defense of those is not to be undertaken who can not be adequately defended.
14. Those things are not rashly to be given up which can withstand the enemy's attack.
15. Excessive severity not to be wreaked on the vanquished.

[1] It being the prime function of justice (as Cicero tells us) to prevent one man hurting another save in return for wrong done to him, it is one of the first of the obligations connected with war to abstain from making war except on just grounds, so that the law of human society may be preserved inviolate, and to repress all lust of conquest, as being not only inconsistent with justice but also fraught, ordinarily, with many other ills. Offic., bk. 1.

[2] For (as Livy says) no great State can be in repose if, though having no external enemy, it finds one within itself, just as exceptionally strong frames seem safe as regards external influences, but find their very strength a source of trouble. And, as the ambassadors of Darius told Alexander, there is a hazard in over-swollen empery, it being difficult to hold in check what is beyond one's grasp. This led St. Augustine (Quint. Curt., bk. 4.) to say, "As in men's bodies it is better to have a moderate stature coupled (Kingdom of God, bk. 3, ch. 10.) with health than to attain a gigantic bulk involving constant illnesses and not giving you rest when you have attained it, but worrying you with more and more troubles the bigger you get, so a small peaceful dominion is better than a large and turbulent one."

And this seems to be what Calanus the Indian (a distinguished name in philosophical pursuits) was driving at: for he came to Alexander the Great and threw down in front of him a dry ox-hide and then walked on the edges of it, pressing them down with his feet, with the result that, when the hide was trodden on on one side only, the other sides were lifted up high; then after doing this he firmly stood upon the

middle and the whole of the hide remained at rest. By this illustration he was intimating to Alexander that he ought not to spend time on the outlying parts but ought to be looking after the heart of his empire, and that this was the way of insuring quiet to the whole of his dominions. Life of Alexander.

The Spartans afford us an adequately instructive illustration of the same thing. They had made themselves overlords of the whole of Greece, both by land and by sea, and were so consumed by the lust of dominion that they thought to reduce all Asia under their sway, and thereby they stirred up such envy and hatred against themselves that they lost alike empire and liberty. Accordingly, it was a wise reply which Theopompus, King of the Spartans, gave to his wife: he was the first to conjoin Ephors with the kings of Sparta, and his wife upbraided him that he would leave a smaller kingdom to his sons than he had received. He replied that he would be leaving it greater, in proportion as he left it securer. Plutarch, Education of a prince. And this doctrine seems to have commended itself to the warrior Hannibal, when he said to Scipio, "It would have been best if the gods had given to our forefathers the disposition to be content, you with the rule over Italy and we with the rule over Africa, for we have been so greedy of other persons' possessions that we have had to fight for our own." Livy, bk. 30. It holds good in all businesses, but especially (as Cicero says) Offic., bk. 1. in the business of war, that before an advance is made careful heed must be given to preparations and to the thinking out of future plans, and all possible happenings of either kind must be arranged for, some time beforehand, and the way of dealing with all emergencies decided on, and there must be no muddling so that at some future date one may have to say, "I did not think of it"—which Iphicrates used to insist was the most disgraceful thing that a general could say. Plutarch, Apoph.

[3] Further, just as doctors rarely and reluctantly resort to cutting and burning, so we to war, and in no case except of necessity because no other medicine can be found. Augustus furnishes an example of this, for he held all war in utter detestation and never declared war against any people except on the gravest grounds, for he was wont to say that it marked a vainglorious and petty mind to stake the security of the citizens on the uncertain issues of fighting, in order to gratify the passion for a triumph and for a laurel-wreath.

War must also not be undertaken unless the hope of profit bulks larger than the fear of loss; it will otherwise be best to remain quiet, as Archidamus warned the Eleans who were projecting a war without due consideration. Plut., Lacon. Apoph. For (as the same Augustus used to say) those who, in quest of small advantage, subject themselves to no small struggle are like the persons who go fishing with a golden hook, the loss of which, if it were torn off and lost, could not be compensated by the profits of any catch. Suetonius on August. It will, therefore, not be a wise proceeding to make war on the poor. Sesostris, King of Egypt, may be cited as an example of this

point. When he first made war on the Scythians he sent ambassadors beforehand to demand the submission of the enemy, and the Scythians replied with an expression of surprise that the king of so wealthy a people should be foolish enough to enter on a war with poor folk, especially when that course would cause difficulties for him at home; for the issue of battle (said they) is twofold, and the rewards of victory would be none, and the losses were manifest; and so the Scythians (said they) did not anticipate that the loss would fall on them, since the enemy had so many more objects of their desire than they had, and that they would willingly go out to meet him. This they did and drove the king off in flight. Justin, bk. 2.

Reason in arriving at determinations is therefore more to be sought after than bravery in fighting, and it is becoming in a wise man to try every other course before resorting to arms. The Spartan custom, accordingly, may be properly praised, whereby before attacking the enemy they honored Amor with due rites; and the Spartan kings before an onslaught sacrificed to the Muses, to Clemency and Friendship, and not to Mars, deeming it preferable to conciliate the minds of the enemy by agreement and a bloodless peace than to risk the cast of battle. But where the occasion and necessity demand it, there must be hand-to-hand fighting; and an honorable war, in Demosthenes' opinion, is ever preferable to a shameful peace. With wisdom, then, did the Spartan commonwealth, in conformity with the extremely severe laws of Lycurgus, withdraw for some considerable time the eyes of its citizens from Asia, lest caught by its allurements they should lapse into a too dainty manner of life. And that this was no groundless fear is sufficiently shown by their general Pausanias, who, after great exploits, directly he indulged himself in the practices of Asia, did not blush (according to Valerius Maximus) Bk. 2, ch. 9. to weaken his courage with its effeminate practices.

[4] It very often happens, then, that more is lost by victories of that description than is gained. To this that same Asia testifies, for when it became a Roman possession it took over to Rome, together with its wealth, its vices. Justin, bk. 36.

[5] Now it is the part of a brave soul, such as war calls for, to bear success temperately and misfortune bravely, not to be disturbed by difficulties nor (as it is put) be flustered and lose his head, but to employ the resources of an alert mind, and not to quit the path of reason but to confront all kinds of fortune with unvarying courage. And he, in fine, will be a man whose mind (in Livy's language) is neither carried away by the breath of prosperous fortune nor bruised by adverse fortune, such a man as Camillus is depicted in his utterance, " The dictatorship did not give me my courage, nor has exile robbed me of it."

[6] And memorable Roman examples of this thing remain to us, so that it is doubtful whether the Romans were more admirable in adversity or in prosperity, it being said of them, " Defeat does not abate their Justin, bk. 31.

courage; nor, if they conquer, does success elate them." And so in the consulship of Albinus, after the army had been cut to pieces by Pyrrhus and the defeat of Cannæ had been sustained (which was indeed of the gravest character) and when there had been three successive defeats by Hannibal, there was not displayed at Rome even the slightest indication of despair nor any talk of peace, but rather was there a high-souled consideration how to repair the fortunes of war. And it was decided not to ransom eight thousand prisoners who by surrender and without striking a blow had fallen into the hands of Hannibal, though they could have been ransomed at a low figure; but eight thousand stronger young men were bought out of slavery and invested with arms at the public expense.
Bk. 22. This soldiery was preferred (says Livy) although there was the opportunity of ransoming the prisoners at a lower figure.

The same thing happened after the Romans had been defeated in a cavalry engagement by Perseus, King of Macedonia. Perseus yielded to the advice of friends who urged that favoring fortune should, for choice, be employed in furthering an honorable peace, and that he should not be carried away by empty hope and so land himself in irreparable disaster; he accordingly sent envoys to Publius Licinius, the consul, to sue for peace on the same terms as had been granted to Philip. During the de-
Bk. 42. liberations spectators were excluded and (in Livy's words) the Roman firmness of design prevailed and it was decided to return the answer that peace would be granted provided that the King would allow to the Senate the power to issue decrees in all matters of high politics touching himself and the whole of Macedonia. The conquered laid down for their conquerors conditions such as are usually imposed on the conquered. For such was then their habit—in reverses to adopt the bearing of success and in successes to curb their spirits.

Like to this was the conduct of Marcellus. His army had been defeated and put to flight the previous day; so the following day, after severely rebuking his troops, he advanced in battle array; and, when Hannibal received the news of this, he exclaimed, " I have, for sure, to deal with an enemy who can not bear either good or bad fortune; either he wins and then he fiercely follows up the beaten or he loses and then he renews the contest with his conquerors." Marcellus indeed gained a
Livy, bk. 27. great victory, and so when Pyrrhus saw that though he had overthrown a number of Roman armies the survivors made haste to form a new army, he said, " I see clearly that I was born under the constellation Hercules, who found the lopped-off heads of his enemies springing up again from their own blood in just the same numbers, as if from the
Florus, Rom. Hist., bk. 1, ch 18. Lernæan serpent."

And indeed this high-souled firmness of the Romans was of such avail that it constrained Pyrrhus to be the first to sue for peace, although he was the victor and although his army had received large reinforce-

ments; and though he claimed that the terms of the peace should be on the footing of equality, yet, on the proposal of Appius Claudius Cæcus, it was decided to tell the King in reply that he must quit Italy and that then if it suited him he might make proposals for friendship and alliance; but that, so long as he continued under arms, the Roman people would fight against him even if he had got the better of a thousand Albinuses in battle. Plut., Pyrrhus.

Indeed, just as we have shown by previous examples that it was a difficult thing to vary the Roman custom of refusing to be upset by reverses, so let their rule of not being elated by success be illustrated by the reply which Scipio Africanus made to Antiochus when the latter, after his defeat, was suing for peace:

" We Romans [said he] have ever borne (and ever will) the same heart and courage in all fortunes. Neither has prosperity lifted it aloft nor adversity put it down. For proof hereof I might produce your friend Hannibal as witness, to say nothing of others, but that I can address me to your own selves. For after we had passed over Hellespont, even before we saw the King's camp and army, when the hazard of war was indifferent, when the issue doubtful and uncertain, look what conditions we then offered upon your treaty for peace, while we were equal one to the other; well, those same and no other we present to you now that we are conquerors and you are conquered." Livy, bk. 37.

Of a truth this equability of temper and this moderation are not only worthy of a great man (for, as Varro writes, the wise man ought alike to bear prosperity temperately and misfortune bravely and mildly), but they are also frequently and commonly found to be of the highest importance in the conduct of affairs, for it usually is the case that prosperity begets negligence. It was on this that Lucius Marcius relied after the death of the Scipios; for with the remains of their armies, after an address to the troops, he attacked the two camps of the Carthaginians in Spain on the same night, finding everything there in neglect and disorder, and he took them and slaughtered the enemy. Amyntas, too, proving Livy, bk. 35. superior in battle, drove the Egyptians to Memphis and besieged this place and led his troops out to lay waste the country; but the enemy seeing that their conquerors were dispersed and reckless, in reliance on their victory, attacked them, and Amyntas with all his men was put to the sword. Quint. Curt., bk. 4.

It was accordingly a wise remark of Quintus Fabius Maximus that he was more apprehensive of some evil arising from the success of his colleague Minucius than from any untoward event; and his judgment was not at fault, for his colleague, elated with success, joined battle with the enemy and placed himself and his army in unmistakable peril, but was rescued by Fabius. So also when that rash man the consul Terentius Varro, Livy, bk. 22. in the course of operations against pillagers, had come off best in a certain

irregular encounter, Hannibal without any difficulty put up with that loss, nay he preferred to believe it the (as it were) insatiate rashness of an impetuous consul and a raw soldiery; and so indeed it turned out to be, for by their foolish rashness (against which Varro's colleague, Lucius Æmilius Paulus, strove in vain) that disastrous defeat at Cannæ befell the Romans; and the self-same Varro, who was just as humble after his experience of defeat as he had been impetuous before it, indisputably alienated the minds of the Campanians from the Romans by the way he disclosed the defeat. A brave man ought therefore to use every endeavor not only not to be broken by failures, but also not to be puffed by successes—and all the more so because we can ordinarily bear bad fortune better than good fortune.

Livy, bk. 22, end, and bk. 23, begin.

Accordingly, the day after Epaminondas gained the victory of Leuctra he went forth in neglected and lowly fashion (though he was, on other occasions, wont to be seen with anointed body and beaming countenance), saying that on the previous day he had been too elated in mind and that he was chastising that excessive joy. And when Philip overthrew the Athenians, with whom certain Greek cities had joined themselves, in a great battle, it was wise of him so to conquer as that no one felt the victory, and he so restrained himself between his own silent joy and the enemy's grief that he was not deemed by his own men to be rejoicing nor by the enemy to be overbearing; yet that victory gave Philip the overlordship of the whole of Greece.

Plut. Apoph.

Justin, bk. 9.

[7] Further, there are two well-known precepts laid down by Plato for the guidance of statesmen, which are peculiarly applicable to the obligations connected with war. One is, so to watch over the interests of the citizens as that the statesman's every action should be referred to that object, regardless of his own private advantage; the other is to take care of the whole of the body politic, not paying regard to some one part and neglecting the rest; for the curatorship of the State, just like private guardianship, is to be conducted in the interests of the parties whose business has been put in trust and not in the interests of the trustee.

Cic., Offic., bk. 1.

[8] A brave man, then, will take heed (as Cicero says) that he does not campaign and expose himself to dangers more for his own advantage than for that of the community, for the greatness of soul which manifests itself in dangers and toils is in fault if it lacks justice and fights not solely for the common advantage but for private gain—if indeed the Stoics be right in declaring that bravery is a virtue when fighting on behalf of right, and that nothing can be honorable which lacks justice.

That quality of mind, therefore, which is ready to encounter dangers (the afore-mentioned Cicero tells us) must be labeled audacity rather than bravery, if it be driven into dangers by its own greed and not for the public weal. Accordingly Callicratides, the Lacedemonian general, was deservedly blamed for preferring the loss of his fleet to that

of his private renown; and so, too, Cleombrotus, who through fear of detraction joined battle rashly with Epaminondas. How much more correct was Quintus Fabius Maximus, who preferred that his own power should be lessened by the empty populace rather than win fame by mismanagement. And the man in question urged Lucius Æmilius Paulus, when the latter was starting for the war against Hannibal, with the rash Terentius Varro as his colleague, to conduct the war against Hannibal by sitting still and not rashly to engage with the enemy; and he made him the following address:

"Resist them you shall well enough if you will stand firm and hold your own against all bruits and speeches of the people; if neither the vainglory of your colleague, nor the rumors that shall be falsely blown abroad to your disgrace, shall once stir you. Old saws these be: That truth may too often be sick, but it shall not die: He that will despise vainglory, shall attain in the end to true glory. Let them call you fearful for careful, slow for considerate, an ill soldier and ignorant for a skilful warrior and experienced. If you adventure all things boldly, Hannibal will contemn you; enterprise nothing rashly, and he shall dread you." Livy, bk. 22.

There is extant also the celebrated speech of the eminent Lentulus to the same effect, made on the occasion when the Romans had been surrounded at the Caudine Forks and an embassage had been received from the Samnites saying that there would be no other conditions of peace than that the Romans should pass under the yoke, unarmed and with one garment apiece. These were his words:

"I have heard my father, O ye consuls, oftentimes make report that he was the only man in the Capitol who persuaded the Senate not to ransom the City from the hands of the Gauls with gold, seeing that they were not inclosed either with trench or rampart by their enemies (who were most idle in such works and in making fortifications), but might break through them, if not without great danger yet without assured destruction. Were the case so now, that just as they then, being armed, might have run down out of the Capitol upon their enemies (in which sort oftentimes the besieged have sallied out upon them that lay in siege), so we might but fight with our enemies in any place (it skilleth not), good or bad, even or uneven, I would not in giving counsel be any jot behind my father in courage and valor. For I confess, verily, that to die for our country is a brave death; and for my own part ready am I even to offer my body as a sacrifice to present death, and engage myself among the thickest of my enemies, thereby to save the people of Rome and the legions. But, alas, here I see my country, here I see all the Roman legions that there are, who, unless for their own selves they will run upon their death, what have they else to save by their death? Why, some man will say, the houses and buildings of the city, the walls, and that multitude that inhabit the city. Nay, rather, if this army fortune

here to miscarry, they are all clean betrayed into the enemy's hands and not saved. For who shall defend them? Peradventure the weak and unarmed multitude: even as well surely as they defended it against the violence of the Gauls! Or will they send for an army from Veii and beseech again the help of Captain Camillus? Nay, here in this place is our whole hope and puissance; in saving it we save our country; in offering it to death, we abandon and betray our country. To yield ourselves is a foul and shameful thing; but such is the love of our country that we ought to preserve it as well with our utter shame, if need require, as by our death. Let us undergo then and abide this shameful indignity whatsoever, and obey that necessity which the very gods themselves can not overcome." [Livy, bk. 9.]

[9] We are bound, then, to take all measures which will serve the interests of our fatherland and State, and we ought to shrink from no disgrace in its defense, not even from death itself if circumstances demand it, but (in Plato's words) if your fatherland requires that you should give yourself up to be flogged or to be imprisoned, or if it sends you to battle where wounds may be received and death encountered, you must render absolute obedience; there must be neither shuffling nor flight; but alike in war and in court and (in a word) everywhere the mandates of your State or fatherland must be executed; for in all our actions we ought to have regard not to our own advantage and interests, but to the well-being of our country. [Cic., against Vatinius.]

[10] Indeed, death for one's fatherland has ever been reckoned a most glorious thing; and so Cicero exclaims: "O death, happy above all others, when the debt of nature is paid for one's fatherland!" On the other hand it is a most shameful thing, when the occasion offers a valorous and honorable death on behalf of one's country, to prefer life at the cost of disgrace and cowardice. [Dig. 27, 1, 18.] [Philipp. 14.] [Cic., to Herenn., bk. 4.]

Those, in truth, who die on behalf of the Church obtain a heavenly kingdom, and that is the meaning of Cicero's utterance: "They, then, whom you have slain will expiate even in the world below the penalty of parricide, but you who have so gloriously yielded up your last breath have obtained the seats and habitation of the blest." And indeed the soldiers of the Cimbri of ancient times held death on behalf of their country so glorious that they did not deem themselves blessed unless they died fighting, on the ground that they had not otherwise been steadfast to the end of their life; they would, accordingly, leap for joy when in the battle-line, as if about to quit life in a glorious and blessed way, while they would mourn, when stricken with disease, at the approach of a disgraceful and miserable end. [c. 9, C. 23, qu. 8, and c. 46, C. 23, qu. 5, and Span. Ordin., bk. 3, tit., 25, par. 2] [Philipp. 14.] [Val. Max., bk. 2, ch. 6.]

[11] It follows that those generals and soldiers who, in the struggle for victory, expose themselves to extremity of danger in battle and encounter, wherein death is more probable than escape, are not to be

forthwith convicted of mortal sin, for (in the words of St. Augustine): "No blame attaches when in battle those die who must die at some time or other: it would be the timid rather than the religious who would find anything to blame there, for although no man may effect his own death (so to do being mortal sin), yet it is allowable to expose oneself to death or to extremity of peril for a just cause, as on behalf of one's country or the Catholic Church." Ambrose, accordingly, defends the brave Eleazar from a charge of sin and covers him with praise, in that he slew an elephant which towered above the rest and wore royal trappings, because he thought the king was on it, and was himself crushed to death by the beast in its fall.

Bk. 3 against Faust. Manich. And c. 4, C. 23, qu. 1.

c. non licet, [C. 23, qu. 2 ( )].

Aug., Kingdom of God, bk. 1, chs. 20 and 21.

De offic., bk. 1, ch. 20

Maccab., bk. 1, ch. 6.

[12] Nay, if (in the interests of his country's well-being) one were to kill his father or his son, he would not only be guiltless but even worthy of reward. And this holds good, I think, if the destruction of his country be really in question and the son can, neither by advice nor by threats, avail at all to divert his father from his design; for there is abundant authority among the philosophers for preferring the well-being of one's fatherland to the well-being of one's father, and the law too takes the same view, whatever Bodin may say to the contrary and in rash rebuke of the expounders of the law. When Fulvius, the son of a senator, was setting out to join Catiline, his father had him called back and put to death. This was a noble act. He, indeed, who betrays his country is guilty of high treason.

Dig. 11, 7, 35.

Cic., Offic., bk. 3.

On Dig. 1, 1, 2 and Cod. 2, 7, 14. Bonaud in his supplem. to Terrarubea, tract. 3, art. 3. To the same effect what Clarus gives in § feudum, qu. 21, nu. 3.

Republic, bk. 1, ch. 4

Sallust, Catiline.

Dig. 48, 4: 1 and 2.

[13] Further, as regards that second precept of Plato, great diligence must be employed lest when we are proposing to safeguard individual parts of the State we subject the body as a whole to danger. Accordingly the defense of allied cities and other places which are not easy of defense ought not to be lightly undertaken in war. It is better to leave them exposed to the enemy than by a futile defense of them to endanger the main concerns; or even to bring them into reputed danger, for often what is noised about over widely and made more serious than is actually the case, is of first-class importance to the whole issue of the war.

And so the saying goes that rumor takes part in war and that trifles drive the minds of men towards hope and towards fear. That is why Philip, King of Macedon, after sustaining defeat in war at the hands of the Romans, turned and laid waste the allied cities and other places which he had no means of defending, and summoned all the men who were capable of following him, giving permission to owners to take with them such of their goods as they could, the rest being the booty of the soldiery. To do this was a bitter thing for Philip, but he wanted to take away at any rate all movables from land which was soon to pass to the enemy. And in doing it he seems to have copied the example of the Suevi who, when war was made on them, used to hold a council and then send messengers in all directions ordering the inhabitants to quit the towns and

Livy, bk. 32.

take their children and wives and all their goods into the forests, and bidding all who were capable of bearing arms to assemble at some one
Caes., Gallic war, bk. 4. spot.

On the same principle, when Vercingetorix was planning a revolution and attempting to seduce the Gauls from their loyalty to the Romans, he induced the Bituriges to burn their towns which were not free from danger, having regard to their state of defense and the nature of their position, lest they should yield cover to such of their men as wished to shirk military service or should be open to the Romans for the pur-
Caes., Gallic war, bk. 7. pose of forage and pillage.

Absolute precautions must, however, be taken that none of these measures opens the way to cruelty or greed; for when Hannibal on the one hand could not hold with his garrisons all the peoples of Italy who had joined him—at any rate without splitting up his forces into a number of small detachments (a thing highly inexpedient at that juncture)—and on the other hand could not, by the withdrawal of his garrisons, leave the allies who had trusted him void of hope and a prey to fear, he plunged headlong into greed and cruelty and yielded to the sacking of
Bk. 26. the places which he could not protect. But (says Livy) the issue showed how foul that plan was, for not only did he thus alienate the minds of those who suffered these indignities, but the minds of other men too; indeed the example affected a wider circle than the calamity itself. Better advised were the Romans after they had sustained the defeat of Cannæ; they carefully scrutinized all the resources of their dominion and when their distant allies implored a garrison they did not send one, not having sufficient strength, but bade them shift for themselves and abstained
Livy, bk. 23. from all cruel measures against them.

Adroit, indeed, was the conduct of the consul Marcus Porcius Cato, when waging war in Spain, on the occasion when ambassadors came to him from Bilistages, the chieftain of the Ilergetes, to complain that their strongholds were besieged and that they were without hope of resistance except in the protection of Roman soldiery. The consul was harassed by a twofold anxiety: he did not want to desert his allies and he did not want to diminish his army, inasmuch as this would entail either his delaying battle or incurring greater risk in battle. He decided not to lessen his army for fear that the enemy should inflict some disgrace on him meanwhile, and determined that his allies must be fobbed off with a hope rather than with anything actual, for fictions posing as facts have often been of the greatest service in war and one who believes he has obtained assistance is in much the same position as one who has actually obtained it, for he finds safety in that very trust and in hoping and daring. Accordingly, Cato made answer to the envoys that, though he hesitated to lessen his own forces by lending them to others, yet he was mindful of them and of their crisis and danger more than of himself; so he had a

proclamation made to a third part of the men of every cohort, bidding them quickly cook the food which they were putting on shipboard, and ordered the ships to be got ready by the third day thereafter. The envoys did not leave before they had seen the soldiers embarked; and, noising it abroad as a matter now beyond all doubt, they filled not only their own men but the enemy also with the news of the approach of Roman help. But the consul, now that he had made enough show to satisfy appearances, had the soldiers recalled from the ships. By this means he put heart into his allies to sustain a siege by the hope of help and deterred the enemy from carrying on the siege, yet himself made for the enemy with unimpaired strength and gained a glorious victory. Livy, bk. 34.

[14] Further, just as the defense of those parts which you can not protect ought not to be rashly undertaken, so also those parts ought not to be deserted which can sustain and shatter an attack of the enemy. In this respect Antiochus made a disgraceful blunder. He had been beaten by the Romans in a naval engagement; and, because he had been driven from the possession of the sea, he distrusted his capability to guard the outlying parts and so (by what later events showed to be a cowardly plan) he ordered the garrison to be withdrawn from Lysimachia lest he should be overwhelmed at that spot by the Romans. Now he might not only have easily protected Lysimachia from the first onslaught of the Romans, but also have sustained a siege during the whole of the winter and, by thus prolonging the time, have reduced the besiegers to the extremity of want. Livy, bk. 37.

[15] Lastly, among the other obligations connected with war, Appian, Syrian war. Cicero includes this: not to be excessively severe to the conquered, seeing that there is nothing more praiseworthy, nothing worthier of a great and eminent man, than readiness to be appeased and clemency and

> Parcere devictis et debellare superbos.
> (To spare the conquered and break the proud.)

The multitude, accordingly, should be spared, and those fugitives who throw themselves on the good faith of a general ought to be received (even, as Cicero says, when a battering-ram has knocked down the wall) and only the leaders of the crowd should be punished, for (as our author says, *ad Herennium*): " It is a brave man's part to reckon those Bk. 4. as enemies (*hostes*) who are striving for victory and to judge as men those who are conquered, so that bravery may lessen the evils of war, and humaneness add to the blessings of peace."

Now in the matter of the destruction and plunder of cities, Cicero strongly urges that good heed be given not to do anything rashly or cruelly. In this respect Marcus Marcellus won for himself the highest praise. He issued a proclamation in a general assembly giving the wealthy city of Syracuse to the soldiers as booty, but, before doing so,

he wept and he provided in his proclamation that no one should injure a free person.

Acc. to St. Aug., Kingdom of God, bk. 1, ch. 6.

Scipio, too, after the capture of Carthage, which was filled with statues and votive offerings in the Greek style, brought from Sicily, proclaimed that people might come from each of the quarters of the city to identify and carry away their own property, and he did not allow any of his own men, whether free or slave, to accept anything by way of booty or even to buy anything, while the others were busy with the work of destruction.

Plut. Apoph.

Caius Cæsar, too, used to say that nothing afforded him greater pleasure than to spare the multitude, and he wrote to Trebonius, his legate, who was besieging Marseilles, expressly charging him not to allow the city to be carried by assault, lest the soldiery should get overexcited and, by reason of their hatred of defection and their disregard of himself and their protracted toils, should put all the young people to death, as they were threatening to do.

Caesar, Civil war, bk. 2.

Clemency, accordingly, is not only worthy of a great man, but it is in many cases found to be both serviceable and glorious. This is the meaning of the answer made by Philip, the father of Alexander the Great, to those who were urging him to order the adoption of stern measures against the Athenians. He said that their opinion was absurd, in that they would have a man who was displaying so many acts and endurances, and with so much glory, overthrow the theater of his glory. So, too, after the Spartans had compelled the Athenians to surrender, there were some who urged that so hostile a city ought to be destroyed and its very name with it; but the Spartans said that they would not allow one of the two eyes of Greece to be plucked out. And Livy writes that the kings of Macedonia, who were wont to fight to the bitter end in battle, would spare towns, as far as they were able, with a view to possessing a more opulent dominion; for where is the wisdom of destroying the very things the possession of which is being fought for, so that nothing is left to oneself but the war? Accordingly, we read in Dionysius of Halicarnassus that the third ordinance of Romulus was this: Not utterly to destroy towns that were taken in war; nay, Livy writes it down as a characteristic of war that the vanquished are enabled, by satisfactory terms of peace, to get the better of the victors and control them.

Plut. Apoph.

Paul Oros., bk. 2, ch. 17.

Bk. 31.

Rom. antiq., bk. 2.

Livy, bk. 1.

It does not seem out of place to append here the wise advice of Belisarius, whereby he dissuaded Totila from the overthrow of Rome. When Totila had entered Rome as victor he had determined to level it entirely with the ground. Belisarius wrote to him urging him to do nothing rashly: "For [said he] one of two things will inevitably happen, either you will be beaten in this war and give in, or you will win by the aid of propitious fortune; now if you come out victor and have destroyed Rome you will have ruined, not some one else's property but

your own; whereas, if you shall have preserved it, you will beyond doubt have preserved the finest and richest royal residence in the world. Should you, however, be beaten by us, you will have the right to expect undying gratitude from your conqueror for preserving the city unharmed; whereas if it be destroyed he will proceed against you without any leniency." Under the influence of this letter Totila abstained from the destruction of the city.

Acc. to Pet. Crinit., de honesta discipl., bk. 6. following Procopius.

By a similar dilemma certain eminent men of this Academy of Louvain softened the enraged heart of the Prince of Orange, for when in that wicked expedition against his fatherland A. D. 1572 he was besieging the city of Louvain, which had no garrison, and the wisest citizens saw that they could not withstand the force of the enemy, they elected—despite the baseness of coming to terms with a wicked and unjust foe and in order to avoid the sight of the violation of all things human and divine, the profanation of temples, and the destruction of by far the most renowned Academy by utterly abandoned enemies—to yield to necessity and to buy off all these evils by the payment of a fixed sum of money rather than risk the cruelty of the enemy. And when the Prince was not satisfied with the amount of the ransom he went so far in his shamelessness as even to require from the citizens of Louvain an oath which they could not take without committing treason, and these same men, who would rather have died than bind themselves by so great a crime, checked the shamelessness of their enemy in the following way: they said,

" Either you will gain this battle which awaits you with the royal army (under the Duke of Alva) or you will be beaten. If you win, there can of course be no dealings between you and us, for we, willy-nilly, shall be in your power; but if you are beaten (the fortune of war being so doubtful) there is no reason why you should wish to incur our wrath and the King's and the Duke of Alva's."

And in this way, without treason to the king's majesty and by means of a necessary but not disgraceful agreement, they secured the interests of their commonwealth with consummate wisdom.

This commendation of humaneness and clemency is, however, subject to the limitation that severity must be employed on behalf of the State, especially when this is entirely necessary for the State. That is why the Romans utterly wiped out Numantia and Carthage, although the Pontifex Maximus, Scipio Nasica, was opposed to the destruction of Carthage, the rival of the Roman empire, and, when Cato clamored for its destruction, he maintained the contrary, through apprehension that security was the enemy of weak souls and because he saw how needful it was that fear should act as a fitting guardian to the (so to say) infant citizens. And his opinion was not at fault, for the Roman State began from that time to waste through ease and luxury.

Kingdom of God, bk. 1 ch. 9. On this point St. Augustine has some fine remarks. And Samuel, Appian, Punic war. too, made it abundantly manifest to the people that God had stirred up 1 Sam., ch. 12. enemies against the Israelites in order to keep them in the path of duty. Judith, chs. 2, 3 and 4. For men have a way, when they have more strength than is wanted for external wars, of using it up in conflicts with one another, and this kind of war is far the most deadly. The Spartans, therefore, did well in refusing their permission, when one of their kings promised to destroy a city which had given them a deal of trouble: "Do not (said they) Plut. Apoph. destroy the whetstone of valor."

Further, it is provided by law that in time of war, when the interests of the State demand it, houses (whether belonging to enemies or to citizens) which are built up to the walls, and from which there is a risk of fire or of ambush, may be overthrown and destroyed, even with- Cod. 8, 10, 9; and 8, 11, 14. out the payment of compensation.

CHAPTER II.

Of the commander or general of an army.

[1, 2] If a war has to be waged the thing of first importance is to decide whom we shall appoint to command the army, for it is a true old saying that an army is worth just as much as its general is, and there is nothing harder to be found than the perfect general. Now this designation "imperator" used to be of common application to those who were appointed to command an army for a given period, but subsequently Cæsar adopted it as a standing title after he had acquired the supreme headship of the State and herein he was followed by others. Appian. Pref. to Rom. Hist.

[3] For the reason given above, Philip of Macedon used to say Tacitus, Annals, bk. 3. that he wondered at the Athenians' appointing new generals every year, seeing that in the whole course of his life he had found no more than one good general, Parmenio. He used also to say that an army of deer commanded by a lion would excel an army of lions under the leadership of a deer. And so Caius Cæsar, when going into Spain to campaign against Petreius, declared that he held him cheap because he was going to an army without a general. And when Caius Fabricius heard that the Romans had been beaten by Pyrrhus he said, "It is not the Epirotes who have beaten the Romans, but Pyrrhus." And indeed the case of Marcius Plut., Apoph. Coriolanus clearly shows (according to Livy) that the Roman superi- Livy, bk. 2. ority lay in their generals rather than in their army; for when Coriolanus took command of the Volscians, they were victors though they had always before been vanquished by the Romans.

Hence Epicrates, when discoursing on the military art, says that an army is comparable to an animal much like a man, the general being its head, the drawn-up battle array being the breast and trunk, the infantry being the hands, and the cavalry the feet. And just as, in the case of the body, when the head is disturbed and upset, the other members can not discharge their functions; so when the general is discomposed his army can not but waver and fall into peril and ruin.

And after Alexander's death Leosthenes compared his army (which was wandering about and knocking up against itself) to the Cyclops, who after the loss of his eye kept poking out his hands as far as he could, but not in any definite direction, and similarly after the loss of its general an army with its great bulk is convulsed by unregulated movements. And just as, after the departure of the soul, the corpse does not remain holding together, but is scattered abroad in dissolution, so was Alexander's army, after his death, a prey to tremors and was jostled about and tossed to and fro.

Plut., On fortune and valor of Alex., orat. 2.

And indeed the greater the difficulties which a war presents, the more care should be bestowed in preparing for it (as said above); but if less, we must try to get a general the equal of the opposing general, for (as Quintus Fabius used to say) any sailor or passenger can manage the helm in a calm sea, but when a gale springs up and the vessel is swept by the wind over a stormy sea, then a man and a helmsman is required.

Livy, ch. 24.

[4] On these grounds Plato laid it down that no one ought to be put in charge of a military expedition before his thirtieth year, not even if of well-approved valor and covered with military glory. And this was the age which the Athenians adopted as the statutory age for military office, although they at times allowed exceptions to the rule, notably in the case of Alcibiades, who was such a favorite of the populace in his early manhood that he drew on him the eyes of all whenever he appeared in public, and no one at Athens was reckoned his equal. He was given command in the Syracusan war before attaining the statutory age. Two much older men, however, were given him as colleagues, Nicias and Lysimachus, in order the better to guard the interests of the State.

[5] The Romans, too, had their *leges annales* whereby a greater age still was required for the consulship (out of mistrust of the rashness of youth) and for other magistracies. The men of olden time, however, had not these *leges annales*, really old as they were (so Cicero says), but they were introduced many years later, by the rivalry for office, in order that the struggle for the several steps of office might take place between men of the same age, the result being (as Cicero also tells us) that in many instances great capacities for virtue were extinguished before they could be of service to the State. But the men of earlier days, who held that they ought not to expect an outstanding and surpassing virtue to increase with years, promoted persons to honor according as they excelled in virtue without taking into account either age or family or any

other attribute, but simply reckoning each man at his proper value: this appears from Dionysius. Rom. antiq., bk. 6.

"Indeed," says Cicero, "in olden times the Rulli, Decii, Corvini, Philipp. 5. and many others, and in more recent days the elder Africanus and Titus Flaminius, having been elected consuls quite as youths, achieved such exploits that they have increased the power and adorned the name of the Roman people. Nay, did not Alexander of Macedon meet his death when he was thirty-two, having begun to perform the greatest exploits from the very outset of his life? And this is ten years earlier than our laws permit men to be consuls."

Whence (as the same Cicero tells us) it can be perceived that the development of valor is quicker than that of age. Further, Valerius Corvinus, who was made consul in his twenty-third year, used to say that the consulship was the reward of merit and not of blood: and Lucius Quintius Cincinnatus, a very poor man, owning only four acres of land and cultivating them with his own hand, was summoned from the plough to Rome to assume the dictatorship, being the only hope of the Roman people. And this, says Livy, it is worth while for those to hear who Bk. 3. despise all things human except riches, and imagine that there is no great scope for honor and virtue save where there is abundance of wealth. Those again who were sent by the Senate to Attilius to summon him to assume the sovereignty of the Roman people, saw him sowing seed, yet those hands worn with rustic toil established the public safety and hurled to the ground the huge forces of the enemy. Val. Max., bk. 4, ch 4.

[6, 7] Again, Cicero holds that a general ought to possess the Pro lege Manil. following four qualities: knowledge of the military art, valor, authority and good fortune; and that the foremost merits of a general are the following: industry in affairs, bravery in dangers, assiduity in action, promptitude in execution, prudence in planning. Yet nothing worthy of high praise will be accomplished without practice and exercise, for in the art of a general as in other arts three things are requisite, natural aptitude, education, and experience—natural aptitude being disclosed in the man's intelligence, education in his knowledge, and experience by its products.

[8] Now since events correspond to one another nowhere less than in war (and so, as Hannibal said to Scipio, the least possible reliance is to be placed on even the best stroke of good fortune), a general must give great heed not rashly to engage with the enemy, staking all on the doubtful cast of battle; but rather to pursue safety on principle than success at haphazard. Let principle guide him, not chance, for the latter is deceptive and by small causes produces vast mutations of fortune. We read accordingly how Cæsar became more and more reluctant to engage in battle towards the end of his life, deeming that the more victories he had won the less reliance was to be placed on the happenings of chance and that he would not gain by victory as much as disaster would Suetonius, Life of C. Caesar. cost him.

[9] And, indeed, just as successful achievements secure the good-will of an army (as Cæsar said), so ill-success secures ill-favor: and so a general will be acting more shrewdly, more safely, and more gloriously (according to the opinion of Pericles), to overcome his enemy whenever he can by intellect and reason rather than by the sword, for since the works of the mind rank above those of the body (as Cicero says) so we derive more satisfaction from the conquests of our intellect than from those of our strength. And this is taken to have been the meaning of the custom of the Lacedæmonians, whereby a general who had won a victory with much bloodshed and great slaughter of the enemy sacrificed a cock in lieu of a trophy, whereas one who by obtaining a surrender and by a treaty and by his assiduity had won a not over-bloody victory and had avoided the worst evils of war, sacrificed a bull.

Dion, too, says in his *De regno*, that far greater things are accomplished by the shrewdness of a few than by numbers and strength, a fact which Homer is adverting to when he introduces Agamemnon as asserting that he could much more easily settle Troy's business if he had ten Nestors or Ulysses for counsel than as many Ajaxes and Achilles for stout fighting. That is the drift of the speech of Ulysses to Ajax found in Ovid: (Metamorph. 13.)

Quippe manu fortes, nec sunt mihi Marte secundi:
Consiliis cessere meis: tibi dextera bello
Utilis: ingenium est quod eget moderamine nostro.
Tu vires sine mente geris: mihi cura futuri est:
Tu pugnare potes; pugnandi tempora mecum
Eligit Atrides: tu tantum corpore prodes;
Nos animo: quantoque ratem qui temperat, anteit
Remigiis officium: quanto est dux milite major:
Tantum ego te supero: nec non in corpore nostro
Pectora sunt potiora manu: vigor omnis in illis.

* [All these had been my rivals in the shield,
And yet all these to my pretensions yield.
Thy boisterous hands are then of use, when I
With this directing head those hands apply.
Brawn without brain is thine; my prudent care
Foresees, provides, administers the war:
Thy province is to fight; but when shali be
The time to fight, the king consults with me.
No dram of judgment with thy force is joined;
Thy body is of profit, and my mind.
By how much more the ship her safety owes
To him who steers, than him that only rows;
By how much more the captain merits praise
Than he who fights, and, fighting, but obeys;
By so much greater is my worth than thine,
Who canst but execute what I design.
What gain'st thou, brutal man, if I confess
Thy strength superior, when thy wit is less?
Mind is the man: I claim my whole desert
From the mind's vigor, and the immortal part.]

* Translation by John Dryden.

And so on, in Ovid's poem, where he tells how the armor of Achilles, for which Ulysses strove with Ajax and which was offered to the worthier, was awarded to Ulysses.

Therefore glory resides not alone in bodily strength and in mighty muscles, but rather in moral virtues (as Ambrosius says). Wherefore also the giants whom we read of in Holy Writ, much as they excelled in strength and bulk, yet because they had not wisdom perished because of their foolishness; while on the other hand it is written of the wise man, "There arose a knowing son and through him was overthrown all the power of the enemy."

De offic., bk. 1.
Baruch, ch. 3.
Eccles., ch. 47.

[10] A discreet and wise general, then, according to the teaching of Euripides, is to be preferred to a daring and rash one, since (as the same writer said) a great force of soldiers can be overcome by wise counsel. And so Xerxes, who led so many thousand men against the Greeks, was beaten by the efforts of one man, Themistocles. Aristides, accordingly, used to say that arms were not the only resource against an enemy, but that counsel was the first resource; for, when we can escape from superior strength by planning and diligence what boots it to encounter dangers?

[11] Hence military experts discern exceptional merit in a general who carries on war on such a principle that he and his army are provided, in the most convenient way, with food and water and wood and fodder, while the enemy on the other hand is deprived of all these and driven to surrender, if possible, by famine: and who, though he may think that he could join battle with great safety, yet deems it safer, by holding roads and cutting off supplies, to gain a woundless victory.

This was the principle which especially commended itself to that consummate general, Julius Cæsar, who determined not to join battle with Afranius and Petreius (of Pompey's faction) unless absolutely compelled, for he had set before himself the hope of being able to finish off that business without a fight and without one of his soldiers receiving a wound, by cutting off the food-supplies of his adversaries, asking himself why he need lose any of his men, even in a successful engagement, and why he should allow troops who had deserved so well of him to be wounded, and why, in a word, he should run the risks of fortune, especially as it was no whit less a general's business to overcome by strategy than by the sword. And in the end he compelled his adversaries to surrender by stress of utter want. And on the same principle Pompey might easily have crushed Cæsar at Pharsalus through his lack of everything, as he had planned to do, had not he suffered himself to be diverted from his plan by his soldiers in their elation after the victory of Dyrrhachium. But it was Fabius Maximus who won the greatest renown in this class of warfare, even according to the testimony of his enemy Hannibal, who said that Fabius, when not fighting, inspired him with greater fear than Marcellus did when fighting; and his opinion was not at fault,

Caes., Civil war, bk. 1
Appian, Civil war, bk. 2.

for Fabius by his devices and by sitting quiet had already reduced Hannibal to such a condition that he not only had no provisions left of what he had seized day by day, but nowhere to seize any for the future, as all the corn had been gathered from all sides into the fortified cities when the open country had become insecure, so that provisions for hardly ten days were left (as subsequently was discovered), and it had been arranged, in the event of a decision to await the seasonable ripening of the crops, that the Spaniards should return home because of the dearth of supplies. All this the consul Terentius Varro upset by his rashness; and although on his arrival Hannibal, who was surrounded by these difficulties, saw that the enemy's forces were augmented by a half, he was exceedingly glad, for he hoped (as really happened) that fortune would give play to the preposterous disposition and rashness of the consul; and by the blun-
Livy, bk. 22. der of this man that terrible disaster of Cannæ befell the Romans.

Caius Sulpicius, dictator against the Gauls, also adopted the same system, and was in no way inclined to trust himself to fortune, there being no stress of circumstance, against an enemy whom lapse of time and the strangeness of the locality were weakening day by day, and who was lingering without any organized commissariat or solid means of defense. Moreover, those minds and bodies which derive all their
Livy, bk. 7. strength from attack find their strength lessened and enfeebled by delay. Indeed, when Alexander was besieging Leucadia, he let every one from the neighborhood take refuge there in order that their store of provisions might be consumed all the quicker, and after this was consumed he gained an easy victory. Antigonus, also, after ravaging the territory of Athens, departed at the sowing-season, and when their remaining corn had been used for sowing purposes he returned and again destroyed their actually grown corn, and reduced the Athenians into his power when they were exhausted by hunger.

We ought, therefore, to bear in mind the advice which Cambyses gave to his son Cyrus, never to be overtaken by lack of supply, but in times of plenty to bear scarcity carefully in mind; for it is more common to see an army worn out by want than by battle, hunger being (in the words of Vegetius) keener than the sword.

Accordingly, as we have said, it is by such devices before all that an enemy is to be overcome; and rash joinder of battle should be avoided save where the circumstances imperatively demand it, after the example set by Scipio who, when he was sent against the Numantines and saw the boldness, bordering on madness, of the enemy, said that he would in time visit the enemy's boldness on him and that it was the part of wisdom to exploit the folly of others, for a good general, like a good doctor, ought to use steel for curing ills only in the last resort. None the less, he
Plut., Apoph. rose up in his own good time and overthrew the Numantines.

Side by side with this may be placed the advice of Sertorius, who, at the time of Sulla's proscription, was compelled to become commander of the Lusitani and, being unable to divert them by speech from joining battle with the whole Roman force, brought out before them two horses, the one very strong and the other very weak; and then he had the tail of the former plucked hair after hair by a decrepit old man and the whole tail of the latter tugged at by a young man of exceptional strength, thus suggesting that the Roman army was like a horse's tail, portions of which any one who tried could destroy, while he who attempted to destroy it as a whole would more speedily yield up the victory than gain it. By this illustration Sertorius brought round to his way of thinking those barbarians whom he could not bend by argument.

[12] Further, just as one ought not rashly to tempt fortune and undertake difficult tasks, so when one has once begun them they ought not to be lightly given up. Of this Marcellus gave an example on the occasion when the Roman soldiery, rashly approaching the walls during the siege of Casilinum, sustained many wounds without any corresponding degree of success. Fabius was then of opinion that this minor operation, which was just as difficult as a major one, should be forborne and stopped, as graver matters were pressing, but Marcellus urged that, though there were many exploits which great generals would not attempt, yet, when once they were begun, they ought not to be given up, because the influence of rumor would be great one way or the other, and he insisted that the undertaking should not be abandoned. Livy, bk. 24.

The conduct of Cæsar's troops, then, at the siege of Avaricum was worthy of all praise. They were beset by all manner of difficulties and Cæsar told them that he was purposing to raise the siege for want of supplies, but they one and all begged him not to leave the matter unfinished, saying that it would be a standing ignominy to themselves if they abandoned a siege which they had begun and that the great influence of rumor on war was rightly admitted by the best generals, and that he who retires was deemed to have been put to flight. Caes., Gallic war, bk. 7.

[13] Accordingly, as in other affairs so especially in war, perseverance and confidence are most excellent qualities in a general and often produce the most important results on the whole issue of a war. Of this the Romans furnish us with striking illustrations; and notably so after their defeat at Cannæ, when, though the resources of their State were exhausted, they dared to send reinforcements into Spain and, while Hannibal was actually knocking with his army at the Porta Capena, they prevented the site of the enemy's camp from being sold for less than if the Carthaginians were not in occupation of it. Such conduct as this (says Valerius Maximus), what else is it than to overcome adverse fortune by one's self-respect and turn its ragings into benefits? And that is the meaning of Cæsar's saying that if all things are not going well, ill-fortune can be mitigated by effort. Bk. 3, ch. 7.

In the same spirit of confidence Scipio Africanus neither punished the spies of Hannibal who had been captured in his camp nor interrogated them about the plans and resources of the Carthaginians, but had them handed over to the military tribunes and bidden to observe everything without any fear and be taken whithersoever in the camp they wanted to go; and then, having asked them whether they had explored everything with complete convenience, he provided them with an escort and sent them back to Hannibal. And by this display of absolute confi-
Bk. 3, ch. 7. dence (as Valerius Maximus says) Scipio inflicted a blow on the spirits of his enemy instead of on the enemy's arms, for Hannibal was so exceedingly struck by the confidence of his enemy that he forthwith sent a messenger to Scipio begging for an opportunity of an interview, with the idea that he would be able to obtain more equal terms of peace if he
Livy, bk. 30. sought peace with strength unimpaired instead of after a defeat.

[14] Further, generals of great renown, with their clear perception of the great advantages of perseverance and confidence, are in the habit of so acting before an engagement as to inspire their army with the utmost degree of confidence in themselves and in that way to fortify the spirits of their troops. This they used to do in divers ways. The dictator Valerius Corvinus, when making war with the Samnites, before giving the signal of battle would spend some days in skirmishes for the purpose of sampling the enemy, so as that the novelty of battle and of
Livy, bk. 7. the enemy should not frighten his men. The consul Quintus Fabius, on the eve of engagement with the Etruscans, in order to revive the spirits of his troops, whom the enemy's numbers had alarmed, sang the praises of the Samnite wars which they had brought to a very successful issue and disparaged the Etruscans, saying that the one enemy could not be compared with the other, nor the one array with the other, and furthermore that they would know in course of time about another secret missile concerning which he must meanwhile keep silence; and in this enigmatical manner he feigned that the enemy was duped and marvellously
Livy, bk. 9. fortified his troops. And undoubtedly the ingenuity of Fabius in this course deserves praise and imitation by generals, for it is a common weak-
Civil war, bk. 2. ness of human nature (as Cæsar said) to place too great reliance on the unseen, hidden, and unknown, and also to be overmuch terrified thereby; and (says Livy) the false, posing as true, has frequently been of the greatest service in war.

Men of old, too, deemed it peculiarly the business of religion to fortify the spirits of their troops. And that is the explanation of all the auspices and oracles: if perchance these seemed to portend some mischance, generals would sometimes, by an adroit interpretation, twist it into a good augury in order to rid their troops of fear. Innumerable instances of this are extant.

[15] Now, just as there must be much done in the way of fortifying the spirits of the soldiery, so also a great point should be made of keeping back everything that might cause them alarm or in any way upset their minds; for (as Cæsar said) one conceals a wound of the body, and in the same way any evil plight of the army should be concealed, lest by its disclosure the troops should be alarmed and the enemy emboldened. In this respect the conduct of Terentius Varro, after the defeat of Cannæ, is rightly held blameworthy; for when the Campanians sent envoys to him to Venusia, whither he had come with a scanty half-armed band, he so added to their disdain of his circumstances and person by over-disclosure and revelation of the defeat, that the legates, who had already delivered their message, which was, that they were distressed that any misfortune should have befallen the Romans, and who had promised all assistance in prosecuting the war, returned home and reported (such was their disdain of the consul and of his speech in which he despaired of everything) that the very name of the Romans seemed as it were blotted out; and this made all the Campanians inclined to a revolt, assured that they would be able to gain the overlordship of Italy, and they, accordingly, made a treaty with Hannibal. Livy, bk. 22.

In the same way Philip, King of Macedon, conceived the unwise idea that he would advance somewhat in the affections of his men and that they would be rendered more keen to incur danger on his behalf if he had some horse-soldiers buried who had fallen in a slight skirmish with the Romans; so he ordered the bodies to be fetched into the camp, so that every one might notice the funeral honor. Yet, what he thought would make his men readier to risk all combats, simply produced alarm and backwardness; for those who had seen the wounds made by spears and arrows and occasionally by lances in the wars which they had been accustomed to carry on with Greeks and Illyrians, when they beheld bodies shorn by the Spanish sword, arms cut off, the whole skull split open, heads severed from the body, protruding entrails, and other horrible kinds of wounds, were on all sides thunderstruck to perceive the sort of weapon and of men they had to fight against. Livy, bk. 31.

Similarly, when the Romans saw that the populace was upset and frightened by the sight of the corpse of the consul Publius Rutilius Lupus, who fell in the Social war, and of the corpses of not a few other nobles, which had been brought back into the city, the Senate by decree ordained that thenceforth the bodies of those killed in war should be buried where they had fallen, so that the sight of them should not make the survivors more backward in their military service. This ordinance was soon noised abroad and even the enemy copied it. Appian, Civil war, bk. 1.

[16] Now Chabrias, the Athenian general, used to say that the best general was he who got to know most of the affairs of the enemy; Plut., Apoph. and we do indeed read how ignorance of these has led to the rout of

many armies and how it has not seldom brought down into a critical condition those who were at the height of their prosperity. Thus, when Cassius was beaten on his wing by Cæsar's troops and driven from his camp, he committed suicide in despair because he thought that Brutus too was overcome, although the wing of Brutus was really successful. During a great battle between the Romans and the Volscians, night separated the combatants before an issue was arrived at, and (by an error similar to the foregoing) so great fear seized on both camps, owing to their ignorance of the result, that both armies left their wounded and a large part of their baggage and betook themselves to the neighboring Livy, bk. 4. hills as if they had been beaten. And Curio, Cæsar's legate in the civil war, putting undue trust in fugitives who reported that King Juba (who had joined Pompey with large reinforcements) had been summoned to a neighboring war, and that his prefect Suburra had been despatched with only a moderate force, rashly joined battle and, being surrounded Caes., Civil war, bk. 2. with his army by the royal forces, was cut to pieces.

[17] Accordingly, since (as Cicero says) it is a fault of human nature to believe greedily what we wish for and to expect others to think the same as we do, we ought to be very slow to trust fugitives and spies. And in this respect Cæsar, aforementioned, finds fault with the habits of the Gauls. They often, says he, engage in resolutions concerning the most important matters, induced by nothing more than reports and stories, of which they must forthwith repent, since they yield to mere unsifted reports and since they receive from most people answers framed agreeably to their wishes. It is therefore fitting that those who hold command should go out in person to examine, when any unusual difficulties arise, as Marcellus did, saying to his colleague, "Nay, we will go ourselves to examine, with a few horsemen, since things which are brought before our eyes will furnish a more certain basis for counsel."

[18] Again, it will be in the highest degree profitable for a general to lead in person in all enterprises of hardship and difficulty, for when you wish to enjoin anything on a subordinate, if you first impose the obligation on yourself and your own people, you will more easily render every one obedient. Accordingly a good general should imitate that brave and strenuous leader Gideon, whom God raised up and gave to the Jewish people. He addressed his men as follows: "What you shall see me do, do ye also." For (as Seneca says) good health flows from the head into the rest of the members. And in this connection there are the noble words of Valerius Corvinus, who said:

"As they ought to go into the field, every man trusting in his own manhood and glorious warfare, so should they have an eye under whose leading and regimen they were to enter into battle: whether he were a man that in the hearing of his soldiers could only make goodly and magnifical orations, fierce but in words, void of military works, or he who

himself knew how to handle his weapon, to advance before the standards, yea, and to be employed even in the middle medley of all the battle. I would have you, my soldiers, to follow my deeds and not my words, and of me to learn not only discipline but also good example, who by this right hand of mine attained unto three consulships and to the highest honor." Livy, bk. 7.

In this fashion, also, Caius Cæsar often restored order to a disordered line of battle, opposing himself to the fugitives, and holding them back individually, and turning them on the enemy with a wrench of the throat. And so in that doubtful battle which he fought with the Suetonius on Caesar. younger Pompey in Spain, when his soldiers were fighting in a half-hearted way because of their fear, and matters were in a critical condition and his exhortations produced no effect—he snatched up a man's shield and rebuking his soldiers he rushed on the enemy saying, " Now is the end of my life and of your soldiering." By this act, their fear giving place to shame, he restored order to the line of battle, after having received two hundred darts in his shield. Appian, Civil war, bk. 2.

[19] Here, however, it is above all essential that the object of this activity on the general's part is to make his men readier to undergo some danger by his own readiness; but he must not rashly expose himself to danger, especially if he holds the supreme command, save where absolute necessity requires and where the issue of the whole war is involved. For we read that numerous cities have been ruined, and even more armies routed and put to flight, by the general's rash death. Thus the death of Publius Scipio in Spain, due to his exposing himself overmuch to the enemy's missiles, led beyond doubt to the victory of the enemy and the defeat of the Romans. And the wound of Cnæus Scipio at Munda, when the Romans were markedly getting the upper hand, struck terror into his men, anxious as they were about their commander's health, and proved an obstacle to an indubitable and glorious victory. So also when Livy, bk. 24. Hannibal fell wounded at the siege of Saguntum, having too carelessly approached the wall, there was such a flight and flutter round about him that the works and pent-houses were almost deserted. So when Epami- Livy, bk. 21. nondas fell, who did the duty not only of general but of the bravest soldier, there fell with him all the energies of Thebes, for (as Justinus Bk. 6. says) just as by smashing the edge of a dart you take from the rest of the missile its power to hurt, so when that great Theban general was removed, who was (as it were) the point of their dart, the energies of the State were blunted, so that it did not seem that they had merely lost him, but that with him all the energies of the Thebans had died out.

Let not leaders, therefore, put overmuch confidence in fickle fortune, not even in the shield of Jupiter, under which (according to Homer) they dwell; but in incurring dangers let them (says Cicero) Offic., bk. 1. copy the custom of doctors, who employ mild remedies for mild dis-

orders, though they have to use more risky methods in more serious diseases. This is what the saying of Æmilius Paulus points to, uttered at the banquet with which, after the defeat of Perseus, he was celebrating his victory: i. e., that it is the same kind of skill that keeps an army really Plut., Apoph. terrible to enemies as keeps a banquet really pleasant to friends. And Scipio Africanus, when taxed with being too little of a fighter, replied, "My mother bore me to be a general, not a fighter," meaning to show that the secret of success in arms lies rather in one man's knowledge and genius than in the arms and strength of many; for the arts of generalship and of soldiering are not identical.

[20] Further, a general, and more especially a sovereign prince, should bear in mind the counsel of Antigonus. He was tossed about by a violent storm, having all his family with him in the same ship, and he is reported to have enjoined on his children, for their own remembrance and for them to pass on to their issue, Not to dare to subject the whole of their race to a common danger at the same time. And mindful of this precept, Philip, when about to make war on the Romans, hesitated to trust his two sons at the same time to the hazard of whatever might by chance befall, and so he took the elder with him and sent the younger into Macedonia to assume the guardianship of his kingdom, thus copying the example of prudent heads of families who will not lay up the whole of their fortune in one place lest, if it should happen to be destroyed by earthquake or fire or war, their whole substance should be gone. And this is the meaning of that saying which is current among Dig. 32, 79, 1. husbandmen and which Celsus reminds us of in a passage which Cora- Miscell. jur. civ. bk. 1, ch. 13. sius expounds finely, Money without a fund laid by is a frail matter (*Pecunia sine peculio fragilis*).

Pro lege Manilia. [21] Further, not only is valor in war (as Cicero says) to be looked for in a consummate and perfect general, but there are also many qualities which are excellent handmaids and companions of this valor. Now it is especially looked for in one who wants to govern others that he can govern himself and his desires, and that he exercises over himself, in the hardest and sternest manner possible, that mastery which he proposes to exercise over others; for he who can not restrain himself is also unable, as general, to restrain an army, nor can he be severe in judgment who will not let others be severe judges of himself. Let him therefore refrain his passions, despise pleasures, control his temper, check his greed, and chase away the other flaws of character. And to one of this Paradox. character (as Cicero says) fortune herself surrenders, she who is said to wield the greatest power, especially in war, and who (as the wise poet has said) renders to every one according to his character. Just as it is narrated of Marcus Porcius Cato, a man endued with all the virtues, that he had such force of character and intellect that, wheresoever he had been born, he would seem able to mould his own fortune, alike in Livy, bk. 39. military and in civil life.

And it was with reason believed that Alexander the Great would have been more successful had he conquered his pride and wrath, those unconquered evils, and the other faults of his character; he, however, whom the arms of the Persians could not overthrow, was vanquished by his vices. Agesilaus, too, that consummate general, used to say that he would rather conquer evil desires than take the greatest city of the enemy, because it was a finer thing for a man to preserve his own liberty than to take away that of other persons. And Scipio, deservedly, did not get greater glory by capturing Carthage than by restoring, inviolate and untouched, to her bridegroom Allucius, a captive girl of such surpassing beauty that wheresoever she went she drew the eyes of all upon her, the amount of her ransom being given to Allucius by way of dowry. And the same Scipio produced more effect in Spain by the reputation which he had won for himself for clemency and self-restraint than by the unconquered arms of the Romans. Poetic fictions, therefore, about monsters tamed by Hercules and slain tyrants, mean that the good general, put before us in the guise of Hercules, ought to restrain the corrupt affections of the soul.

Quint. Curt., bk. 6.

Plut., Apoph.

Livy, bk. 26.

[22] Further, when supreme command is given to any one, it will be a well-advised thing to allow him full discretion in the decision of matters of highest import, as did the Senate and people of Rome, who allowed the general full discretion in all things pertaining to war, and left it to his judgment whether it were best to conduct the campaign by sitting still or by fighting, and whether to besiege this or that town; nor did they reserve to themselves anything save the authority to declare a new war and to solemnize a treaty with the enemy, matters which, as we have shown elsewhere, pertain to sovereign power. Accordingly when the consul Quintus Fabius was sent against the Etruscans in order to relieve the Sutrini (allies of Rome), whom the Etruscans were besieging, after he had defeated the Etruscans in battle and put them to flight, he pursued the enemy, without the Senate's knowledge, through the Ciminian forest and carried the war into Etruria. And after the defeat of Antiochus, the consul Cnæus Manlius, without the authorization of the Senate or the command of the people, made war on the Gallogræci, for bearing aid to Antiochus; and as the legates who had been with him brought no charge against him he was carried in triumph into the City.

See above, bk. 1, ch. 6.

Livy, bk. 9.

Livy, bk. 38

In the same way, after Cæsar, to whose lot the province of Gaul had fallen, had driven the Germans from Gaul he crossed the Rhine in order to make war on the Sicambri for that they had refused to surrender those who, after fighting against him and Gaul, had taken refuge in the territory of the Sicambri; and he, further, took an army over into Britain because he understood that in nearly all his battles in Gaul help had been furnished from that quarter to the enemies of the Romans. And all these things he did merely on his own authority.

Caes., Gallic war, bk. 4.

The conduct of the war against the pirates, again, was intrusted to Cnæus Pompey by the *Lex Gabinia* for three years in such wise that in the whole sea within the pillars of Hercules and in the maritime provinces up to the four hundredth furlong (*stadium*) from the sea, he had power to order kings and governors and states to furnish him with every-
Plut. on Pompey. Cic., pro lege Manil. Appian on Mithrid. thing necessary for the conduct of that war. And the dictator Quintus Fabius Maximus received permission to do everything he thought beneficial to the republic. And the consul Titus Quintius was allowed full
Livy, bk. 32. discretion to make peace or war with Philip.

Now in these respects you may deservedly bestow praise on the wisdom of the Roman Senate and people, for one who is dependent on the fears and intentions of another can not accomplish anything noteworthy. Moreover, it would have been difficult for the Senate to administer according to its own judgment matters which had not been brought before its eyes, and determine the sites for pitching camps and fix the places to be occupied by garrisons and the times for engaging the enemy and the times for lying quiet, and (as the saying goes) govern for the whole earth—especially as (in Livy's words) if the opportunity afforded by a moment's space flies past and you make ever so little delay, you will soon be seeking in vain to repair its loss.

Further, in order that generals might apply themselves to their lofty tasks with better spirit, in freedom from all anxieties and without being worried by the fear of punishment for their conduct of affairs, the Roman Senate and people, if an operation chanced to be mismanaged, laid the blame on the fortune of war alone and never took any over-cruel measures against them and never exacted (even from those who by rashness and ignorance had lost their armies) more than a pecuniary fine; and a capital charge was hardly ever brought against a general for mismanagement of a war, for they thought that the failure itself and the loss of praise was punishment enough.

An example of this was furnished by the case of Marcus Sergius and Publius Virginius, tribunes of the plebs with consular powers, in the war against Veii. For the enemy chanced to attack a camp in the district commanded by Marcus Sergius and the Romans were unable to protect themselves against the enemy and their only hope was in assistance from the larger camps within the command of Virginius. Now Sergius was in private life a bitter foe of Virginius, and Virginius refused to send help to his colleague unless he begged for it, and Sergius, rather than be seen to have begged help from his foe, preferred to be conquered by the enemy to conquering by the aid of a fellow-citizen. The one, accordingly, was as obstinate as the other was proud. And so it came about that between the two camps the slaughter of soldiers went on for some time, and at last the defenses were abandoned and some few reached the larger camps and the greater part, including Sergius himself, pushed on

to Rome. And there each party's case was discussed in the Senate and before the people on an appointed day and the guilty parties were only fined ten thousand heavy asses each. Livy, bk. 5.

In the same way Marcus Postumius, tribune of the plebs with military power, was also fined ten thousand heavy asses for causing the loss of a battle at Veii. And the consul Caius Sempronius was fined fifteen thousand asses for his failure in the Volscian war. And the only case Livy, bk. 4. that I can find in which a capital charge was brought is that of the prætor, Cnæus Fulvius, for his loss of an army in Apulia—in which case he was loaded with all opprobrium and many declared on oath that the panic and flight began with the prætor himself and that the soldiers turned their backs only when deserted by him, for they could not think their general's fear to be ill-grounded. However, before the day of the assembly of the people arrived he went into exile to Tarquinii. Livy, bk. 36.

But many years before that, Spurius Servilius, on giving up his consulship, was capitally accused, on an appointed day, by the tribune of the plebs, who alleged that when the Etruscans were fleeing to their camp he had followed them up more keenly than was wise and so had lost a picked body of men. The patricians, however, treated this as a most unworthy proceeding, insisting that it was intolerable that those who had indefatigably offered themselves to the enemy on behalf of the State should be accused of cowardice, when fortune frowned, by persons who had never taken their place in the battle line, and they so prevailed with the people that the votes of all were cast for an acquittal, thus proving that it was not for the good of the State that generals should be condemned for want of success. Dion. Halic., Rom. antiq., bk. 9.

Nay, even in the case of the consul Caius Terentius Varro, whose rashness and neglect of the advice of his colleague Lucius Æmilius Paulus brought to the Romans the terrible defeat of Cannæ, and who had forthwith fled, leaving behind him his army and his colleague who had bravely died, no reproach was addressed to him for his mismanagement, but a crowd went out to meet him on his return even from so great a defeat and tendered him thanks for not despairing of the commonwealth—whereas if he had been a Carthaginian general no punishment would have been thought too great for him. Livy, bk. 22.

[23] For the Carthaginians were so stern in the business of war that they crucified generals who had pursued unwise plans, even though they had been successful, imputing their successes to the help of the immortal gods and their errors to their own fault. And so that renowned Val. Max., bk. 2, ch. 7. Livy, bk. 38. Carthaginian general Mago, who was the first to found the empire of the Carthaginians upon an ordered military discipline, and who consolidated the strength of his State not less by his skill in war than by his valor, slew himself through fear of punishment for a failure against the Justin, bk. 19.

Syracusans; and the Carthaginians, not satisfied with this, crucified the corpse of the dead man.

Plutarch, Life of Timoleon.

Further, it should be stated that this wide and large power of dealing at discretion with the loftiest concerns which is granted to a general should be very much restricted in the case of a master of the horse or tribune or other subordinate commander (as we shall say in the proper place). And, indeed, however freely a general is allowed to administer everything at his own discretion, yet he will be liable if he acts fraudulently, for (as Scævola says) he is taken to have received plenary power, but only within the limits of *bona fide* conduct; and whenever a man receives a discretionary trust the test to which its exercise is referred is in all cases the standard of the ordinarily prudent man.

Below, On the office of legate and tribune.

Dig. 17, 1, 60, 4.

Dig. 50, 17, 22, 1; and 18, 1, 7; and 19, 2, 24; and 17, 2, 6.

Chapter III.

Here follow some propositions relating to war and cautions for commanders, affirmed by the examples of men of old.

There should be one head of an army, and not more; with full power; and permanently appointed; and not a man who has previously been reprimanded or disgraced.

1. A divided command in war is useless.
2. On what occasions the Romans used to appoint a dictator.
3. The power of a dictator.
4. A successor should not be sent to a general until the war is over.
5. Monarchy the best form of government.
6. Dangerous to intrust supreme command to one whom you have criticized.

[1] The four tribunes with military power who were appointed at Rome, three of whom set out for Veii after the levy was made, furnish proof (says Livy) that it is useless to split up the command in war Bk. 4. among a number of persons; for each followed his own plans, one taking one line and another another line, and so they furnished the enemy with advantageous openings; and while their battle-line was in confusion and some were ordering the trumpets to sound the advance and others the retreat, the Veians attacked at the favorable moment and drove them to flight. And it was the same when Lucius Æmilius Paulus and Terentius Varro were opposed to Hannibal. And so also, not long ago, when the princes of Germany contended with Charles V, to their great loss. You can not properly split up the command among a number.

[2] And so when some serious war or civil strife threw their State into disorder, the Greeks and Romans used to take refuge in the commandership of some one man—dictator or archon or harmost—as on some holy anchor. Hence when the Romans were overcome by the Veians, " the sorrowing State (says Livy), unaccustomed to defeat, re- Bk. 4. sorted to the appointment of a dictator." And elsewhere Livy says: Bk. 4. " When the people at home raised a tumult and matters pointed to a very serious sedition, the fear-stricken Senate employed their two last resources, viz., sovereign power and the most distinguished citizen; and it was decided to appoint a dictator and Marcus Furius Camillus was nominated." And so when Flaminius, with the greater part of his army, was killed at Thrasymenus and there was much alarm at Rome, the State (says Livy) fled to a remedy which had long been called for but not yet Bk. 22.

applied, namely the appointment of a dictator. And the same writer Bk. 16. tells us how the men of Præneste relied on a civil discord at Rome to lay waste the Roman territory with a hastily gathered force and to bring their standard right up to the Colline Gate; but the Romans turned from civil discord to war and made Titus Quintius Cincinnatus dictator. And when this was noised abroad, the enemy (such was their fear of this magistrate) withdrew at once from the walls and the younger Romans assembled on his command without demur.

Bk. 5. It is, accordingly, not rash to accept Livy's view, that the Gauls would not have captured the city of Rome if she, when driven to her last resources by her numerous troubles, had done as she would have done against her enemies of Fidenæ and Veii and other neighboring peoples and had appointed a dictator against this new and unheard-of foe, who was bringing up war from the ocean and the furthest shores of the earth.

[3] Now when a dictator had been duly appointed by law, he was vested with sovereign authority in matters of war and peace and punishment and reward without appeal, so that he might the better discharge Pomponius in Dig. 1. 2, 2, 18. the duties of sovereignty, in freedom from all hindrances. And so when the consuls Titus Quintius and Agrippa Furius were on an expedition against the Æquians and Volscians, as there were two consuls with equal power in the Roman army the supreme command was resigned by Agrippa into the hands of his colleague (a thing which, according to Bk. 3. Livy, is of very great service in the administration of great affairs). In the same way the distinguished Aristides, who was one of the Athenian generals at the battle of Marathon, as several generals had been appointed with equal power according to the Athenian custom, made over the sole command to his colleague Miltiades and induced his other colleagues to do the same. And it is clear that that proposal, removing, as it did, all rivalries, procured for the Athenians their most glorious vic- Plutarch, Aristides. tory over the Medes.

[4] Now we showed in the preceding chapter how important it is to allow a general free power of providing for the highest interests. Further, since it is undesirable to make a breach of continuity in matters which are best despatched under a uniform administration, a successor to a general should not be appointed save at the completion of a war; for what with the transfer of the generalship and the newness of the successor, who has to give himself up to the things that require learning before the things that require doing, opportunities of successful operations often fall through. That is why Fabius Maximus urged the people to use great care to appoint consuls who could show themselves Hannibal's equals. "For" (said he) "when we have chosen the best warrior and captain in the whole city, then presently, without any longer delay, being elect for one year, he shall be sent to match with an old captain that hath ever continued in the field, one that is not inclosed within com-

pass of time or the strait bounds of law or prevented from managing and ordering everything according as the occasions of war require; whereas by that time that we can make all ready to begin our affairs, the year is come about and clean gone." Livy, bk. 24.

Accordingly when Livy is comparing the Roman generals with Bk. 9. Alexander he makes them out to be more remarkable than Alexander or any other king because the dictatorship was held for periods of ten or twenty days only and no one held a consulship more than a year; the levies were delayed by the tribune of the people; they started for the war late and were recalled early because of the assembly (*comitia*); their year of office expired at the very crisis of the campaign; at one time a colleague's rashness and at another time his perversity hindered or hurt; after a miscarriage they succeeded to another's leavings; they were provided with a raw or an undisciplined army. While, by Hercules, says he, kings, in complete freedom from every kind of impediment, and masters also of circumstances and seasons, control all things in subserviency to their designs, and wait on no one. And over and above all these inconveniences, it was unreasonable, after one man had planted a tree, that another should gather the fruit of it, to borrow the words used by Quintus Fabius Maximus, when he was putting forward his claims to have Etruria assigned to him as an extraordinary province, on the strength of his having opened the Ciminian forest and made a way for the Roman arms, through passes until then impracticable. Livy, bk. 10.

[5] Now by these proofs and illustrations much force is added to the opinion of those who have maintained that monarchy and royal power are the form of State most in harmony with universal nature, and the best. And so the Sibyl is said to have prophesied in her weirds that the well-being of the Roman State was in a monarchy and that its citizens could not otherwise find safety than by having a king. For (as Tiberius used to say) it can not be that a well-constituted State, which is but one body, should have several heads.

[6] Further, it will also be a most hazardous thing to put into the highest command a man whom you have had to criticize or visit with disgrace. Marcus Livius can be taken as an example of this. After his consulship he was condemned by the popular tribunal and, taking this disgrace to heart, he retired into the country, and then in the eighth year after his condemnation he was brought back into the city and made consul a second time. Now the story is preserved how Marcus Livius, being still embittered against the citizens, was cautioned by Quintus Fabius, when starting for the war against Hannibal, not rashly to join battle with any until he had found out of what kind they were, and he replied that he would fight with the first band of the enemy that he set eyes on; and when he was asked the reason for this hurry he said, "I

will either win distinction and glory from the enemy or from the con-
Livy, bk. 27. quered citizens, a pleasure which they owe me, however dishonorable."

In like manner, when Astyages, King of the Medes, hating Harpagus for preserving his grandson Cyrus, slew the son of Harpagus by way of revenge and sent him to the father to be eaten, Harpagus dissimulated for a time his grief and postponed his hate of the king until an opportunity for retribution came; and afterwards, when Cyrus was making war on Astyages, the latter intrusted the supreme command to Harpagus, who surrendered his army to Cyrus as soon as he had received
Justin, bk. 1. it and took vengeance for the King's cruelty by a perfidious defection.

CHAPTER IV.

Whether gentleness and kindness or sternness and cruelty are the more advantageous in a general.

1. No animal the management of which requires greater skill than man.
2. Scipio by humane conduct and Hannibal by cruelty obtained equal renown in military matters.
3. Manlius by severity and Valerius by kindness kept their soldiers in their duty.
4. Heed must be given that overmuch gentleness does not produce contempt or overmuch harshness hatred.
5. Kindness is required in a prince.
6. Love can not mingle with fear.
7. A general will find courtesy to his soldiers more profitable than roughness of manner.
8. Men desire to be treated with kindness and consideration.
9. The habit of obedience allows a milder method of command.
10. Kindness even to an enemy is of much avail.

[1] We have said elsewhere that not merely valor in fighting is looked for in a consummate and perfect general, but that there are also other excellent qualities, hand-maidens and attendants of this virtue. And inasmuch as there is no animal (as Seneca perceived) the management of which requires greater skill than man, the question is frequently raised whether harshness and severity are more requisite in a commander than humaneness and kindness.

[2] In this controversy countless illustrations can be given on either side. First of all, Hannibal and Scipio present themselves, consummate generals who, with very unlike geniuses and even more unlike methods and principles, won equal glory in military matters. For when the latter was sent into Spain he not only conquered the affections of his soldiers by his inborn humaneness and kindliness, but he also, by the reputation for clemency which he had acquired, reduced the whole of Spain under the Roman sway. The former, on the other hand, laid waste Italy with great violence and cruelty and plundering, and all the peoples of Italy and almost all the towns defected to him, so that while Spain was reduced by the humaneness of Scipio, Italy was reduced by the fear which Hannibal inspired.

[3] We have a similar example in Manlius Torquatus and Valerius Corvinus, who lived at Rome with equal virtues and glory, yet with dissimilar dispositions and methods; for Manlius was naturally fierce and exceedingly severe in military discipline, but Valerius won the soldiers by all manner of humaneness and kindliness. This contrast was so marked that the former, with a view to keeping his soldiers in their duty, had his son flogged and beheaded when bringing precious spoils as victor

because he had engaged with the enemy without orders, while the latter found fault with no one: yet with all this difference in their modes of procedure they reaped no dissimilar results and glory. For no disaffection ever broke out among the soldiers of either general, nor did any shirk battle or disobey a command, and each of them accomplished great things. Thus Manlius with his sternness and peremptory edicts established military discipline in a wonderful manner; but Valerius, while paying just as much attention to military discipline, molded the minds of his men into obedient habits by his inborn humaneness and gentleness, and if he chanced to punish any contemners of law and discipline they put this down to the provisions of law and not to the general's severity; for he would not proceed against them in virtue of his sovereign authority (*imperium*) in cases where he could invoke legal process. These examples leave the question before us still an open one.

[4] Further, whichever course we adopt, great judgment and caution must be applied, on the one hand to prevent excessive leniency from producing contempt, as happened to Scipio, among whose soldiers a very serious disaffection broke out in Spain—and on the other hand to prevent excessive severity from producing hate, as happened to Hannibal, who by his cruelty and greed in laying waste the regions which he could not defend, so as to leave them bare for his enemy, alienated the minds of all, not only of those who suffered these indignities but of others
Bk. 36. also. Nay (as Livy says) the example affected a larger number than the misfortune.

[5] Now writers on the theory of kingship put Valerius and Scipio forward as better examples to copy, and demand in a king humaneness and kindliness and such like virtues—as in Xenophon's book about Cyrus.

Offic., bk. 2. [6] Fear (as Cicero says) is a bad guardian as regards duration, while, on the other hand, kindliness is a faithful one forever. And
Satur., bk. 1, ch. 2. Prætextatus says, in Macrobius, "He who is revered is also loved: love can not be joined with fear. What do you think to be the origin of that most arrogant proverb which boasts, We have the same number of enemies as of slaves? We 'have' not the latter as enemies, but we make them so when we behave to them in a haughty, contemptuous, and cruel manner." Accordingly Ennius' lines are excellent:

> Quem metuunt, oderunt;
> Quem quisque odit, perisse expetit.
>
> Whom they fear they hate; whom a man hates, he seeks to destroy.

[7] And, that no resources can withstand the hate of a number of
Offic., bk. 1. people, Cicero shows by the death of Caius Cæsar. And this opinion concerning the death of the "Imperator" (Commander) is confirmed by the example of the consuls Appius Claudius and Titus Quintius. For when Appius was sent against the Volscians, he so harassed the army by

his harsh methods of command, and his roughness so caused the soldiers to become slack and slow and negligent and contumacious, and the minds of all were so embittered with hatred of the consul, that neither shame nor fear would move them, and it got to such a pitch that when the Roman army was drawn out in battle-array, it not only did not desire to win, but desired to be beaten, and made for the camp in disgraceful flight. But when Quintius, who was of a milder disposition, was sent against the Volscians, he won the affections of the soldiers by his courtesy and kindness and gave them all the booty with commendations thrown in (which are not less gratifying to soldiers' minds than rewards are), and after notable achievements he returned to the city. Livy, bk 2.

So when the consul Cæso Fabius was sent against the men of Veii, Dion. Halic., bk. 9. besides manifesting many other virtues of a good commander in the preparation and conduct of the war, he so marshalled his line of battle that, by despatching his cavalry merely, he defeated the enemy's army; but the infantry, because they so hated the consul for his roughness of manner, would not follow up the defeated enemy and retreated with their standards without orders. Yet (says Livy) "the general wist not Bk. 2. what way to remedy this so pestilent an example: so much have men, of excellent wits, been more wanting in skill to govern their fellow-citizens than to vanquish an enemy."

In the same way the dictator Lucius Papyrius was neither popular with his soldiers nor terrible to his enemies—Agesilaus, however, thinks this the greatest praise that can be given to a general—because of the savagery with which he persisted in demanding the punishment of Marcus Fabius, his master of the horse, who had engaged with the enemy without his orders, albeit with success. And so, when the enemy approached the camp of Papyrius, such (says Livy) was the importance of Bk. 8. that single man Papyrius that, if the zeal of the soldiery had seconded the plans of the general, it is reported as a thing beyond doubt that he could have completely crushed the Samnites on that day—he had drawn up his line of battle with such regard to ground and supports and had so strengthened it by every military device. But the soldiery made no exertions, and this of set purpose in order to injure the reputation of the general, and victory was prevented. The experienced general, however, perceived wherein lay the obstacle to his victory, i. e., that his temper must be curbed and austerity blended with courtesy; and so, with the utmost dexterity, by taking especial care of the wounded, he met with such success that through his attention to the healing of the soldiers' bodies he even earlier regained their affections; and, having re-created his army, he attacked the enemy, with complete assurance, both on his part and on that of his men, and defeated the Samnites and put them to flight.

[8] Gravity must, therefore, be seasoned with affability. For, as Xenophon wisely writes, while other animals are brought into condition

by three methods conspicuously—by food when they are too low-spirited, by a lowering diet when they are over-lusty, and by the whip when they are obstinate—man, the most high-spirited animal of all, refuses to be coerced either by threats or by punishment, but he loves to be treated with kindliness and good-will; for, while the brute creation allows itself to be dragged by violence, man will not be led except by reason.

[9] Nevertheless it must be remarked that the clemency of kings and of generals (as Alexander the Great used to say) is founded not only upon their own character, but upon the character of those who obey, for the habit of obedience allows a milder method of command. But where character has no reverence and we make no distinction between the highest and the lowest, there must needs be force in order to repel force.

Quint. Curt., bk. 8.

[10] And, further, kindliness and humaneness are not only of advantage in dealing with soldiers and citizens, but also they have more than once been of greater avail in dealing with enemies than the unconquered Roman arms, as we have already shown by the case of Scipio. The case of Camillus, when he was besieging the Falisci, also illustrates the same truth; for it seemed that this was going to be an unending toil, had he not lured them to make surrender by his considerate act in handing to them the betrayer of their king's sons. The generosity of Fabricius, too, in informing Pyrrhus of the doctor's plot against his life, broke down and conquered the King's heart. And so humaneness (as Valerius Maximus says) conquers anger, lays hatred low, and mingles the enemy's tears with his blood.

Livy, bk. 5.
Val. Max., bk. 5, ch. 4.

CHAPTER V.

Times and seasons to be taken into account, above all in war.

1. The proper conduct in war is one thing, in peace another.
2. In peace custom must be followed, in war expediency.
3. The opinion of Fabius Maximus about the deserter Altinius.
4. Marcellus preferred to conciliate Lucius Brantius by kindness rather than check him by punishment.
5. Scipio Nasica overthrew Gracchus by summoning the good citizens on his own initiative.
6. Octavius Cæsar waged war on Antony of his own motion.
7. Civil laws are silent in time of war.
8. Necessity makes the unlawful lawful.
9. That is not reckoned a breach of law which is done under pressure of necessity.
10. On fit occasions the principle of a war must be altered.
11. Fabius a slow-mover (*cunctator*) by nature, not by design.

[1] Writers on obligations have laid down that in all actions very great heed is to be paid to times and seasons, especially in cases where chance is the dominating factor. And so, as Quintus Fabius Maximus used to tell his son, the consul Quintus Fabius Maximus, judgment and conduct are to be framed one way in the full heat of war and another way in the tranquillity of peace; for in peace those steps may, without hindrance, be taken which equity and justice indicate and we may take our stand upon the law; but in times of war and tumult remedies of this ordinary kind are frequently found to be irritants, and stimulants of war and strife, rather than sedatives. Hence it is often the case that, with the exception of what has been enacted to hold good in perpetuity as being permanently expedient, war abrogates the legislation of peace and vice versa, just as in navigation (as Livy says) one set of measures is employed in good weather and another in bad weather. Cod. 6, 51. pr.

[2] And so (says Cicero) our forefathers always submitted to the guidance of custom in peace and of expediency in war and always, as new emergencies arose, adapted new plans and principles to them; and in another passage he says, " In such a clash of disturbed affairs we can not but do what the times require rather than what is customary." Pro lege Manil. Philipp. 11.

[3] And this was the principle on which Quintus Fabius Maximus, the father, acted in the case of Classius Altinius of Arpi, who had come to the Roman camp secretly by night and promised that for a reward he would betray Arpi. Quintus Fabius Maximus would not allow him to be flogged and executed, as others thought he should be, for that after the defeat at Cannæ, instead of keeping faith through all changes of fortune, he had defected to Hannibal and carried Arpi with him in his defection and then when, contrary to his hope and wish, the fortunes of Rome (so

to say) rose again, he plans a new betrayal. Fabius, instead, determined that he ought to be set for an example to any such as himself who might be coming to their senses and bethinking themselves of their former friends, for if it were allowable to quit the Roman side, but not allowable to return to it, who could doubt that in a short space Rome would be found deserted by her allies and the whole of Italy bound by treaties with the Carthaginians? Still he did not think it right that any trust should be placed in Altinius, but, adopting a middle plan, that he should Livy, bk. 24. be treated as neither enemy nor friend.

[4] It was so also at the time when Nola was in an exceedingly critical condition, Marcellus holding it not so much by means of his garrison as by the good-will of its nobles, and the commonalty verging on a revolt, which was a cause of much apprehension. The ringleader was Lucius Brantius, a young man of energy, whom the general agreement about the expected revolt and fear of the Roman prætor was prompting at one time to a betrayal of his country and at another to desertion. Marcellus perceived that he must either be restrained by punishment or won over by kindness and he thought it better to attach to himself than to drive over to the enemy so brave and active an ally. Accordingly he had him brought, and so worked on the mind of the wild young man by his courtesy and by rewards into the bargain that thenceforward none of the allies served the Roman State with greater bravery and fidelity. But as regards the other inhabitants of Nola who were accused of treason Marcellus, after defeating Hannibal, shut the gates and had a criminal Livy, bk. 23. inquiry held over them.

[5] And the story told of Scipio Nasica tends in the same direction. It was at the time when Tiberius Gracchus, in his tribuneship, was behaving himself very oppressively towards the State by aid of profuse bribery, whereby he had ingratiated himself with the populace and was openly repeating that the Senate ought to be suppressed and the whole conduct of affairs left to the people. And, though there was a general agreement that the consul ought to use force to preserve the State, yet Mucius Scævola declared that he could effect nothing by force. Then said Scipio Nasica, " Since the consul in his regard for strict legality is letting the Roman State with all its laws be ruined, I, private citizen tho' I be, place myself at your disposal as your leader"; and raising his right hand he called out, " Let those who desire the safety of the State follow me." And at this word the better citizens shook off all diffidence and forced Val. Max., bk. 3, ch. 2. Appian, Civil war, bk. 1. Gracchus and his accursed faction to suffer the punishment they deserved.

[6] Hence, too, Cicero praises Octavius Cæsar for taking the field against Antony of his own motion, without waiting for a decree of the Senate; for, as he said, the season for issuing decrees was not yet, and he saw that if he let the occasion slip by without warlike measures the State would be destroyed and the issue of decrees entirely prevented. Philipp. 8.

[7] Sometimes, then, civil laws are silent in times of war and themselves disallow that regard should be paid to them, since he who would look to them may have to suffer injustice before claiming justice. And Cicero, pro Milone. the story told of Caius Marius tends in the same direction. He had given Roman citizenship, in breach of treaty, to two cohorts of Camertians, for their admirable valor in keeping their line intact against the forces of the Cimbri, and he excused his conduct by saying that in the din of arms the words of the civil law can not make themselves heard; for the crisis was one when measures of defense were more proper than Val. Max., bk. 5, ch. 2. hearkening to the law.

[8] And beyond doubt necessity often makes that lawful which c. 26, Dist. 5, de consecr., and c. 3, X, 5, 18. otherwise would have been unlawful. And so when the strength of Rome had been shattered by the defeat at Cannæ, the condition of things was so critical that, at the bidding of the dictator Marcus Junius, the spoils of enemies which were fastened to the temples and consecrated to the divine will were plucked away in order to serve as instruments of war; and mere lads (*prætextati*) put on armor; and several thousands of assigned debtors (*addicti*) and men condemned on a capital charge and slaves were enrolled, for in those days they scorned to have the lowest class of citizens (*capite censi*) for soldiers. Now (as Valerius Livy, bk. 23. Maximus says) this, regarded in itself, is somewhat shameful, but if the Bk. 7, ch. 6. stress of necessity is taken into account in estimating it, it will be seen to be a remedy suitable to the harshness of the occasion. For, as the same writer says, one must yield to fortune in cases where, if counsels which make for the greater safety are not chosen, utter ruin awaits the man who follows appearances.

So, also, when the consuls Caius Marius and Cnæus Carbo were at variance in the civil war with Sylla—a time when it was not so much victory being sought for the State as the State being the reward of victory—by virtue of a decree of the Senate the gold and silver ornaments of the temples which Numa Pompilius had dedicated to the solemn rites of the gods were melted down in order to prevent a failure of the soldiers' pay—so great was the regard paid to public honor even in this time of supreme distress. But it was not, as Valerius Maximus says, the free- Bk. 7, ch. 6. will of the Senate, but thy fell hand, O most loathsome Necessity, that put the pen to that decree.

[9] Nor, again, is that reckoned a breach of law which is done under the stress of necessity and at the instance of public expediency. For by a law paramount, sanctioned by Jupiter, as Cicero says, every- Philipp 8. thing that makes for the well-being of the State is just and lawful. And so, when there was urgent need that the cash in the treasury should be taken out for State use and the quæstors dared not open the treasury because they thought the law forbade, Scipio Africanus straightway demanded the keys and opened the treasury, making the law give way to

Val. Max., bk. 2, ch. 7. Appian, Punic war.

expediency. And the Lacedæmonians, when driven to postpone the law to necessity, are reported to have said, "To-day let the laws go to sleep." Hence, according to some, if a sudden and unforeseen war is apprehended or some other extreme need arises, the Church is bound to make contribution.

Abb. Panormit. on c. 29 (.), X. 2, 24.

[10] Again, in what concerns the administration of a war, a general or commander of an army must, more than most, accommodate himself to times and seasons; and, if the occasion arises, the plan of a war must be altered. And at one time proper conduct calls for a certain impetuosity and ardor of soul and fierce seizure of the advantages of an opportunity, and at another time for slow-going and cautious sitting still. And as this is a difficult matter and contrary to nature, in that (as Livy says) the gods have not given everything to any one man, we must put great care and diligence into the effort to adapt our disposition to the shape of the times; and we ought not always to protract a war, after the fashion of Fabius, nor join battle lightly in our passion for fighting, after the fashion of Marcellus and Scipio and others.

[11] For Fabius, being a slow-mover by nature and not by design, earned his great renown in military matters by favour of the special occasion; for, it being impossible to defeat Hannibal in battle, inasmuch as he was of warlike disposition and rendered fierce by several victories, and as the Roman strength was worn down, Fabius broke the impetuosity of his enemy by sitting still. Yet the same man, following nature and not adapting himself to the occasion, persisted in the same attitude even after the Romans had renewed their strength, and he resisted Scipio's request to have Africa decreed to him as a province, although this was the only way to draw Hannibal out of Italy, as the event showed.

If, however, Scipio had been sent against Hannibal at the time when Fabius was sent, in all probability he would have brought the Roman fortunes even lower by his excessive lust of battle, after the fashion of Flaminius and the other predecessors of Fabius. So difficult it is to alter character and nature. And on this ground a free republic is ordinarily preferred to a monarchy in that you may find there the greatest variety of character to suit varying times.

Above, ch. 3.

In another place of our journey we have shown how useless a divided command is in war.

Chapter VI.

Factions and prolonged deliberations on matters of war are very harmful, especially when what is wanted is action rather than counsel.

1. Very advantageous in deliberations that all should be of one mind.
2. Slow and prolonged deliberations hurtful.
3. In adverse fortune the most daring plans are the safest.
4. The noble deed of Scipio.

[1] As in all deliberations and consultations, so especially in those relating to war, it is very advantageous that all should be of one way of thinking and not spoil good counsels by factiousness and obstinacy (which not infrequently create an extremely critical state of affairs).

And this was made clear to the citizens of Syracuse by one of the chieftains, Apollonides, after the death of Hieronymos, the Syracusan tyrant, when a very serious difference had arisen among the Syracusans, some of whom were for seeking the friendship of the Carthaginians and others of them that of the Romans, and there was a disturbance so great as to be not far short of sedition. Apollonides addressed the men of Syracuse in a speech of much ability and, having regard to the circumstances, of considerable polish, as follows:

"Never was there a city nearer either to hope of assured safety or to fear of utter destruction than this of ours at this present; for, if all would go one way together, and with one accord either incline to the Romans or to the Carthaginians, there were not a city under the cope of heaven whose state were more happy and fortunate than ours. But in case we be distracted and the common weal go divers ways, there would not be more bitter war between the Carthaginians and the Romans than between the Syracusans themselves, when within the same walls there should be banding one against another and each side have their forces, their armor, and captains of their own. And therefore we ought to endeavor our utmost that all may be of one mind. As for the question, which alliance be the more expedient, that is a matter of far too little importance to be consulted long upon." Livy, bk. 24.

[2] Further, just as these contentious deliberations are very hurtful, so, as a rule, are slow and prolonged ones, especially in war, where we read more than once that counsel, which otherwise and in itself is a safe and beneficial thing, has proved rash and disastrous by reason of the delay. And the men of Lavinium furnished a proof of the truth of

this. After wasting a deal of time in deliberation, they only began to send help after the Latins had been defeated, and, just as their foremost ensigns and van were issuing from the gates, up comes a messenger with the news of the defeat of the Latins. Thereupon they faced about and went back into their city: and it is said that their prætor, Milonius, remarked: "There will be a big fare to pay to the Romans for a very short journey." Now the Lavinians might either, by keeping quiet, have retained the friendship of the Romans or, by sending help to the Latins betimes, have rendered their joint forces superior to the Romans.

Livy, bk. 8.

And a further illustration is afforded by what the Latin prætor Annius said, at a time when the Latins were considering about a defection from the Romans and the Romans had in consequence summoned ten of their leading men to Rome and a discussion was taking place about the proper answer to be given in the matters which they believed would be put before them at Rome. "Although I myself," said he, "have moved you to resolve upon an answer, yet I think it concerneth us more in our main estate to determine what to do than what to say. And when we have resolved what course to take, an easy matter will it be to frame words fit for the purpose."

Livy, bk. 8.

[3] There is, therefore, no room for delay (as Tacitus says) in a plan which can only be justified by success; and (as Livy says) in difficult and critical situations the boldest counsels are the safest, seeing that the least hesitation in seizing on the opportune moment, as it flies by, means that you will seek for it in vain thereafter. Caius Cæsar, accordingly, used to say that daring and doughty exploits were meant to be performed and not to be deliberated on.

[4] And in this connection we have the notable deed of Publius Cornelius Scipio. It was after the defeat of Cannæ, and those who had fled to Canusium had offered the supreme command to the military tribunes Appius Claudius Pulcher and Publius Cornelius Scipio. And as they sat with some few others in counsel together about the management of their main affairs, Publius Philus, whose father had been a consul, gave them to understand that all their consultations were in vain, that they did but cherish a foolish hope, and that the condition of the State was desperate; also that certain young noblemen, of whom Lucius Cæcilius Metellus was the principal, minded nothing else but to take to the sea and forsake Italy and fly for succor to some king or other. This evil tidings put them all in a state of consternation and they that were there present laid their heads together and thought good to call others to counsel on the point; and then Scipio, a young man predestined to be the fatal captain of this war, said, "It is no time now to sit consulting, but to proceed to action and to do some exploit. As many therefore as are ready to save the commonweal, take arms and go with me forthwith, for nowhere are our enemies, to say the truth, encamped against us more

than where such designs are being deliberated on." Forth he went with a few following after him to the lodging of Metellus; and, finding there the young men aforesaid, close together in counsel thereabout, he drew his sword and brandished it naked above their heads as they sat in consultation. "I swear before you all," quoth he, "and from my very heart, that I will neither forsake the commonweal nor suffer any citizen else of Rome to abandon her. And if I fail in my word, witting and willing, then confound me, O Jupiter most good, most great, and bring a shameful end upon my house, my family, and all that I have. Swear thou, Lucius Cæcilius, after me as I have done, I advise thee, and ye all that are here present take the same oath; for whosoever shall refuse, know he assuredly that upon him I have drawn this sword." Hereat, they being no less terrified than if they had seen the conqueror himself, Hannibal, took the oath every one and yielded themselves unto Scipio to be kept in ward to serve against Hannibal. Beyond doubt, this deed Livy, bk. 22. brought Scipio greater glory than all the triumphs which he subsequently won.

And thus slow-moving (as Tacitus says) is not wanted when it is more harmful to lie quiet than to be daring, and this is preëminently the case in civil discords and rebellions, where nothing conduces to safety more than swift action, and there is more need of acts than of counsels, seeing that (as Cicero said when urging the prompt adoption of warlike Philipp. 5. measures against Antony) every evil can easily be checked in its inception, while it generally gets stronger as it gets older.

Accordingly, when the Gauls were planning active hostility once more, Cæsar, by dint of forced marches, made sudden onslaughts on the conspirators in all quarters, and allowed no city any leisure to think more about the safety of any other city than about its own, and by this rapidity he kept in their allegiance those who were faithful and frightened those who were hesitating whether to accept his terms of peace, and put down the attempts of the Gauls with complete ease. Caesar, Gallic war, bk. 8.

And so, as the proverb goes, we ought to get to know the times, so as to avoid what usually happens in ill-starred schemes, namely, that the best course proves to be one which it is now too late to take and the fit time for action is allowed to go by in futile delays.

CHAPTER VII.

So long as their strength remains unbroken, the king and State should not admit the slightest derogation from their sovereignty; and those err who think that the pride of an enemy can be tamed by moderation and patience.

1. If once the sovereignty of kings begins to totter, it is easily overthrown.
2. Concessions ought not to be lightly made to an enemy.
3. It is better to surrender a kingdom after defeat in war than without a struggle.
4. Patience and moderation only make an enemy fiercer.
5. Evils should be faced in due time.
6. The fable of the dog.
7. There should be no giving in to the evil designs of an enemy through fear of war.
8. The fable of the wolf, the shepherds and the dogs.

[1] There is nothing more entirely true than what Scipio Africanus said to Antiochus when warning him not to reject the terms of peace which he was offering, i. e., that royal majesty is with greater difficulty drawn down from the summits to a middle position than it is Livy, bk. 37. hurled from a middle position to the depths.

[2] And so, as long as their strength is still unbroken, kings and States should be very chary of allowing any encroachment on their sovereignty, for their main affairs would at the same time be thereby endangered, those to whom the concession has been made being emboldened to ask for more, their own men being rendered less ready to defend them, and they themselves falling into general contempt.

[3] It is, accordingly, more conducive to their good fortune and more consistent with the dignity which is a brave man's due to endure all the chances of war, so long as there is any hope left in arms, rather than by concessions here and concessions there to lose everything without a struggle. It is better to suffer defeat in the main object of the war, after resort, though in vain, to every kind of effort, than to make a concession through fear of war.

Livy, bk. 34. [4] For, as Livy says, the aim of war and peace is to produce a general agreement. And there is no baser act than to surrender a kingdom without fighting, nor more glorious act than to hazard everything in defense of dignity and sovereignty—and all the more so because it is a provision of nature that we generally only make people fiercer against us when we think to overcome their arrogance with patience and lowliness.

This is well shown by the following case of the Latins. They and the Campanians were making war on the Samnites; and envoys, sent by the Samnites to Rome, complained in the Senate that they, though now confederate with Rome, were subject to the same hardships as they had suffered when enemies; and they solicited, with the humblest entreaties, that they would by their sovereign authority keep the Latins and Campanians out of the Samnite territory, if these people really were under Roman dominion, but, if otherwise, that they might employ force to restrain them. To this an equivocal answer was given, because it was mortifying for the Romans to acknowledge that the Latins were not now in their power and they were afraid that, by finding fault, they might alienate them from their side. The case of the Campanians, they said, was different, they having come under Roman protection by surrender and not by treaty; so the Campanians, whether they wished it or not, should remain quiet. But there was nothing in the treaty with the Latins to restrain them from going to war with whomsoever they pleased.

This answer (says Livy) sent the Samnites away uncertain as to Bk. 8.
the conduct which they were to think the Romans would pursue and it also further estranged the Campanians through fear, while it rendered the Latins more presumptuous, they thinking that there was nothing which the Romans would now refuse them. Accordingly, their leading men summoned frequent meetings under the pretext of preparing for war against the Samnites, but in all their deliberations among themselves they fomented a plan for war with Rome. And hereupon their prætor Annius inflamed them with the following harangue:

" If ye ever wished to see the day wherein ye might participate in government and recover your liberties again, lo that time is now come, presented unto you by your own valor and the gracious goodness of the immortal gods. Tried their patience ye have in denying soldiers! Who doubteth but that they were in a great choler when we brake a custom of more than two hundred years' prescription? Yet, nevertheless, this grief have they put by. We warred upon the Pelignians in our own name and quarrel, and they who aforetime allowed not us the liberty so much as to defend our own marches of ourselves, nothing gainsaid. That the Sidicines were taken to our mercy and protection, that the Campanians revolted from them and sided with us, that we levied an army against the Samnites their confederates, they heard and knew well enough; and yet they stirred not forth once from their city. How come they to be so calm and quiet, but upon a knowledge of our puissance and their own weakness? "

And in this way the Romans entered on a war of uncertain result with the Latins, a war all the more grievous to them because due to the excessive patience which they had used in the hope of avoiding it;

whereas, if they had withstood the earliest attempts of the Latins, they would have had little trouble in keeping them in their duty. The Roman forbearance did not avoid the war but only put it off, to the great advantage of the Latins, to a time when the enemy's preparations for war were more complete.

[5] Plans for the future should, then, be thought out beforehand and the best line of conduct be determined on in advance, for any contingency that may arise of either kind; and this ought to be faced before it happens, instead of waiting until you are overwhelmed and the ill grows day by day and gets past cure. This is also a maxim of doctors in the treatment of disease. And so Regulus, when in Gaul, addressing Commanus, King of the Segoregii, insisted that Marseilles (which Senanus, the predecessor of Commanus, had allowed the Greeks to found) would soon or late cause the ruin of the neighboring peoples, and he urged that it ought, then, to be checked in its beginning, lest when it had increased in strength it should overthrow him himself.

[6] And he added this fable: "A pregnant bitch once begged a temporary lodging from a shepherd in which to bring forth her young; and then, after having obtained this, made a second request for permission to bring up her puppies there; and in the end, being installed as guardian of the house, she claimed the ownership of the place." Just in that way, said he, the men of Marseilles, now wearing the guise of tenants, will in time become proprietors of those parts. (Justin, bk. 43.)

If, then, war is apprehended, it is better to attack the enemy before he is ready than, merely in order to avoid a war at the present time, to lay up for oneself a much bitterer war for some future date.

[7] For there should never be any giving in to the evil designs of an enemy through fear of war; so to do is not so much a method of avoiding war as of putting it off to a much more inconvenient season, and you may be sure that often by a posture of war you will be more likely to have peace than by putting your arms on one side and making concessions to the arrogant demands of the enemy, an attitude which rather stimulates and feeds the ferocity of the enemy than appeases it.

(Philipp. 7.) And this was what prompted Cicero's speech, in which he urged the Senate not to make peace with Antony: "By the immortal gods, O conscript fathers, do not, in your hope for a present peace, lose a permanent one." The Romans, accordingly, acted wisely, when Philip and Antiochus were concocting a war, in being the first to take warlike action, and they preferred to shift the war into Greece rather than wait for it in Italy. This is what Vegetius meant when he said, "Let him who wants peace prepare war," and what Manlius Capitolinus used to say, "Just show war and you will get peace: let them see you prepared for blows and they will admit your claim."

For (as Cicero said) salutary severity outdoes a futile show of clemency. If, however, we persist in being clement we shall never lack civil wars. And, as the same writer says in another place, when dealing with civil war: Peace ought not to be granted to an enemy save when he sues for it with arms laid down, but if he sues for it while still fighting he must get his peace by a victory and not by a bargain. This, too, is the drift of Mimus' remark: "It is humane to pardon when the man pardoned is ashamed, but in other cases, by putting up with an old wrong you invite a new one." Epist., bk. 10.

And here we have, I think, the explanation of the fable which was propounded by Demosthenes. It was at a time when Alexander the Great, under the cloak of liberty, had invaded a great part of Greece and was besieging Athens, making out that his conduct was not meant to deprive them of liberty or reduce the city to slavery, but was due to the incessant revilings with which he was assailed by ten insensate citizens of theirs; and declaring that directly these few were surrendered to him he would quit the siege and release the people from war and hunger; but before all he demanded the surrender of Demosthenes and nine other highly distinguished citizens. And the Senate was hesitating and many were calling out that the interests of the many should be considered before those of the few, and those few who were demanded for punishment were in considerable fear and hardly dared to speak because all the others were hoping to gain peace and liberty through their destruction.

[8] And their surrender would have been decided on, had not Demosthenes disclosed the King's crafty snares in the following fable: "Once on a time," said he, "a wolf persuaded some shepherds whose diligence he wanted to elude, to form a friendship with him on terms that his enemies the dogs, who were the cause of their hostility to one another, should be handed over as hostages. The shepherds hearken to him, and the dogs, in conformity with the terms of peace, are handed over, though they had been the most diligent guardians of the sheep. And then the wolf, putting fear aside, tears and devours the whole flock till his lust is satiate and mangles the shepherds, too. This," said Demosthenes, "O men of Athens, is what Alexander is now doing, demanding, as he does, the surrender of all those whose speeches are aimed against his schemes and who lay open his snares, so that when the city is deprived of its guardians he may the more easily attack and plunder it." Plutarch, Life of Demosth.

Chapter VIII.

Whether it is better to await war at home or to carry it into the enemy's territory.

1. Scipio's opinion.
2. The opinion of Quintus Fabius Maximus.
3. The Athenians more successful in war at home than abroad.
4. The fable about Antæus.
5. A courageous aspect a great advantage to the fatherland.
6. Although Agathocles could not withstand a siege at home, he nevertheless carried the war into Africa.
7. The plan of Hannibal.
8. The opinion of Agis.
9. The advice given to the Romans by Hiero, King of Syracuse.
10. War abroad to be conducted in one way, war at home in another.
11. The soldiery better at a distance from their homes.
12. The useful example of Fabius.

This question has been very variously discussed by generals of the highest renown, and many arguments and examples have been cited on either side, so that it is not easy to say which opinion ought to be followed.

[1] And there was once a keen contention on this matter between Quintus Fabius Maximus and Publius Scipio; the latter sought the allotment of Africa to himself as a province, asserting that the war with Hannibal would not be brought to an end save by carrying an army over into Africa and thereby diverting the war from Italy; and he pointed out the effect of striking fear, of one's own initiative, into the enemy and of putting another into peril and removing danger from oneself; and he used for this the example of Hannibal himself. He pointed out, too, the great difference between seeing the territory of another ravaged and of seeing your own overrun by fire and sword, and how much more courage a man has who is causing danger than one who is warding it off. And (he continued) it would be consistent with the dignity of the Roman people, and the high reputation they enjoy with foreign kings and peoples, to appear to have had spirit not only to defend Italy, but also to carry hostilities into Africa. Let the Roman camp (said he) dominate the gates of Carthage rather than that we Romans should again behold the rampart of the enemy from our walls; let Africa be the seat of the rest of the war; let terror and flight and the laying-waste of lands and the defection of allies and the other disasters of war be diverted thither.

[2] Fabius, however, maintained the contrary, holding that Hannibal ought first to be driven out of Italy in a straightforward way rather than be drawn into Africa by roundabout methods. This, said he, is

naturally the first object, to defend your own possessions, and after that you can proceed to attack those of others. Let the object be peace in Italy, not war in Africa; let us be free from fear ourselves before we bring it upon others, and that, too, in a quarter where there are no harbors open to the Roman fleets, no allied city, no friendly king, no room anywhere either to take up a position or to advance, but whichever way one turns one's eyes, all is hostility and danger. The Carthaginians will defend the walls of their capital, the temples of their gods, their altars and their hearths in other sort than they defended Spain. Where Hannibal is, there is the head and bulwark of the war, and if he be drawn over into Africa, he will only be rendered more powerful in arms and men by the nearness of Carthage and the friendliness of all Africa. Livy, bk. 28.

[3] Now on Fabius' side there is, too, the example of the Athenians; for so long as they carried on war at home they always came off conquerors, but when they despatched a great fleet into Sicily they plunged their flourishing State into lasting ruin, as the result of one naval battle.

[4] And what is told of Antæus, King of Lybia, also makes for Fabius' view, for he was invincible to the Egyptian Hercules so long as he waged war in his own dominions, but when Hercules had craftily lured him outside he was struck down and lost both life and kingdom. And this gave rise to the story that Antæus, being the son of the Earth by Neptune and second to none in strength and bravery, as often as his limbs were weary received fresh strength at the touch of his mother Earth, and so Hercules, when fighting with him, grasped him by the middle and lifted him up from the earth, not being able in any other way to master him, and forced him to yield up his life thus clasped to his bosom. Lucan, Civil war, bk. 4.

Thomyris, too, queen of the Scythians, no whit frightened by the approach of Cyrus, preferred to conceal his approach rather than go to meet him, thinking that the issue of the fight would be more favorable to herself if it took place within the boundaries of her realm; and there, after luring Cyrus into a narrow defile, she ambushed and slew him with two hundred thousand Persians. Justin, bk. 1.

So, too, when the Lacedæmonians once were waging other wars against some neighboring peoples, the Thebans, under the leadership of Epaminondas, conceived the hope of seizing their city and silently set off for Lacedæmon; but no more than a hundred Spartans, worn out with age, who had remained at home, offered battle to the fifteen thousand Theban soldiers.

[5] Such courage and strength does the sight of one's fatherland and household gods afford, and so much more do things that are present (says Justin) draw out the finer qualities of men than things that are a Bk. 6. mere remembrance; for the Spartans had before their very eyes the

interests and persons that were at stake and this gave them resolution either to conquer or to die.

This, too, was the meaning of the advice which Titus Quinctius Flamininus gave the Greeks when they were compassing a war on Zacynthos: "Not like a tortoise (which is safe against all blows so long as it stays in its shell, but if it protrudes any part is open to attack and defenseless in the exposed member) to expose themselves to danger by sticking their heads out of the Peloponnese." Livy, bk. 36 Plut., Apoph.

On Scipio's side in the argument, however, is the result of that very war, in which he overcame Hannibal (who had carried on the war in Italy for thirteen years scatheless); for he first lured him into Africa, and then gained a glorious victory over him.

[6] In the same way, when the Carthaginians had drawn the line of siege round Syracuse and the tyrant Agathocles saw that he was not of sufficient strength or well enough equipped to sustain a siege, he straightway, with admirable boldness (it being as if one who could not defend his own things were to attack another's), carried the war into Africa and pitched his camp at the fifth stone from Carthage; and, after overcoming Hanno, the Carthaginian general, and ravaging Africa, he seduced numerous splendid towns, which weighed the obligations of friendship by reference not to good faith but to success, to defect from the Carthaginians to himself. Justin, bk. 22.

[7] Another thing on Scipio's side is the plan which Hannibal proposed to Antiochus after he himself had spent thirteen years in Italy carrying on war with the greatest glory. Antiochus was turning over the question of a war with Rome, and Hannibal suggested that he should make Italy his field of operations, seeing that Italy would supply both soldiers and provisions to an outside enemy and that in Italy the Romans could be beaten by their own resources and strength and arms, while if no action took place in Italy the Roman people would be able to carry on war outside Italy with all the strength and supplies of Italy and no king or people would be the equal of the Romans. Livy, bk. 34.

[8] This, too, was the view taken by Agis, King of the Lacedæmonians, who urged that the war against the Ætolians should be carried into their own territory and that they should not be permitted to enter the barriers of the Peloponnese. Plutarch, Life of Agis.

[9] And after the slaughter of Caius Flaminius and the Roman army at Thrasymenus, the same advice was given to the Roman people by Hiero, King of the Syracusans, who was friendly to the Romans, i. e., that the consul to whom Sicily had been assigned as a province should send his fleet into Africa, so that the enemy might have war in their own land and have no respite for the despatch of reinforcements to Hannibal. Livy, bk. 22.

On this plan, too, the people and senate of Rome declared the Macedonian war on the proposal of the consul Servius Sulpitius, to

whom Macedonia had been assigned as a province. He persuaded the people to ordain the declaration of the Macedonian war by the following reason: that it was no question whether the Romans should have war or peace (for Philip, who was projecting a vast war by sea and land, would not allow them that choice), but whether they should send their legions into Macedonia or await the enemy in Italy. How great the difference between these two courses was, they had found out (said he) in the last Punic War; for who doubts that if, when the besieged Saguntines implored aid from the Romans in reliance on their good faith, the Romans had sent it without demur—as their ancestors had done to the Mamertini—they would have succeeded in diverting the whole of the war into Spain? By their dilatory measures, however, the Romans laid up for themselves a great defeat in Italy. And it is unquestionable that if, at the time when Philip had bound himself to Hannibal, by envoys and letters, to make an expedition into Italy, Levinus had been sent with his fleet to carry on war with Philip up in Macedonia, Philip would have been held in check and Italy would have continued in greater prosperity and its strength less impaired. And many commanders and armies would have been spared to it, which the Punic War subsequently destroyed, when Pyrrhus attacked and shook it and advanced victorious almost to Rome itself, and not the Tarentines only, and that tract of Italy which is called Magna Græcia, revolted from the Romans, but the Lucanians also and the Bruttians and the Samnites, who were all induced by Philip's project of coming over into Italy to remain just about as quiet and faithful as they did during the Punic War! Why, if the Romans had then demurred to crossing over into Africa they would even now (continued Sulpitius) have Hannibal in Italy and be at war with Carthage. Let Macedonia rather than Italy be the seat of war. Let the cities and lands of the enemy be wasted with fire and sword. We have already found by experience that our arms are more potent and successful abroad than at home. Livy, bk. 31.

[10, 11] This discourse lends support to the saying of Agathocles, that war is to be conducted one way abroad and another way at home. At home the only aid is that furnished by the resources of one's own country, while abroad the enemy must be conquered by means of his own resources. Add to this, that a soldier is better at a distance from his home, for he has no available shelter and can not evade the necessity of fighting. It was on that principle that Hannibal, when campaigning in Spain, garrisoned Africa with Spaniards and sent for reserves from Africa to enable him to do this. And a soldier will fight all the more Livy, bk. 10. boldly and bravely on hostile soil, in proportion as there is more hope and courage in taking the offensive than in taking the defensive. Moreover, if you have overcome your enemy outside his own territory, he can easily repair his losses and protect his own soil, while if you beat him in

his home, so that he has no opportunity to recruit his strength, you will easily overcome him and dictate an end of the war. And Hannibal would not have found this difficult after his victory at Cannæ, had he made proper use of his victory and of fortune's smiles, for it is quite clear that it was only his dilatoriness that saved the city and empire of Livy, bk. 22 Rome.

Now after putting forward these arguments and illustrations we leave every one a free choice in forming his opinion thereon. Yet, whenever there is a question about the relative advantages of making or awaiting war, repeated scrutiny must be addressed to the points whether the enemy's territory is easy of approach, whether it is fortified, whether it is level or mountainous (so that ambushes may be suspected), and whether you have to do with an enemy who is armed and warlike or with one who is unarmed and unwarlike and whose strength is in his purse. For the latter kind of enemy can easily be crushed in his home by means of his own resources, as in the case of the Carthaginians, but it is quite a different thing when you have to do with an armed, bellicose enemy, well-equipped at home for war, such as the Romans were.

[12] If, however, you have to meet on your own soil a warlike enemy who is accustomed to victory, it will be well to follow the example of Fabius: for he saw that it was no easy matter to beat Hannibal in battle, he being flushed with several victories, and so he adopted the policy of sitting still, whereby he broke Hannibal, and he gave Hannibal no chance of a victory, in order that he might be conquered by others, deeming that he had gone quite quick enough in the direction of victory if he had prevented Hannibal from winning one. By adopting that policy he retrieved the fortunes of Rome when brought low by many disasters.

A very notable description of this policy is contained in the words which that same Fabius addressed to Lucius Æmilius Paulus when moving out against Hannibal. They are as follows:

" The only way to war against Hannibal is that which I took and always used. Neither is it the issue and event alone (for that is teacher of fools) which shows this unto us, but even reason itself, which hath been and will still be the same and immutable, as long as things in the world hold on as they do. We war (you see) in Italy, at home, in our own ground and place of residence—all quarters round about us full of our own citizens or friendly allies, who daily help us and will be ready still to furnish us with armor, men, horse, and victuals. Sufficient proof of their faithfulness have they given us already in our hard distress. Space and process of time make us better and wiser every day than another, and more resolute. Contrariwise, Hannibal is in a strange and foreign land, in his enemy's country, in the midst of all things that are cross and adverse to him, far from his house and home, far from his native soil,

having peace nowhere, neither by land nor sea. No cities receive him, no walls he hath, nothing sees he, wheresoever he goes, that he can say is his own. He lives from day to day upon rapine. Scarce a third part has he of those forces which he transported over the river Ebro. Hunger has wasted more of them than the edge of the sword. And for this small remainder that is left he is scant provided of food. Do you make any doubt, then, that we shall vanquish him by sitting still, who day by day waxes old and feeble, who neither has store of victuals, nor reserves of men nor money?" Livy, bk. 22.

And it is, in truth, admitted that Hannibal was at that time brought to such a pass that he could have been defeated without any trouble, had not the rashness of Terentius Varro given the enemy the opportunity of success. On the same principle the dictator Cnæus Sulpitius dragged out the war in Italy against the Gauls. He was reluctant to run any risks against an enemy whom time and place were weakening every day, and who was lingering on without provision of supplies and without adequate defenses. Moreover, he knew that a little delay enfeebles those souls and bodies who derive all their strength from attack. Livy, bk. 7.

Chapter IX.

Whether it is better at the beginning of a battle to make for the enemy with much din and a vehement charge or on the other hand to hold one's ground and await the enemy's attack.

1. Trifles sometimes very important in war.
2. The Samnites and Gauls fierce in onslaught.
3. Fabius sustained the attack of the enemy and carried the day.
4. Decius attacked the enemy and was defeated.
5. Titus Veturius followed the example of Fabius.
6. The dictator Aulus Cornelius Cossus was successful with his waiting tactics.
7. Cæsar decried Pompey's tactics in ordering his men to await Cæsar's attack.
8. The custom of the Gauls and Germans at the beginning of a battle.
9. The Syrians drew an augury as to future victory or defeat from the din made.
10. The tactics of Cyrus.

[1, 2] Nothing is so trifling that it may not sometimes produce great results in war. What happened to the consuls Quintus Fabius and Publius Decius in the war against the Samnites shows us this. They had so marshalled their line that Fabius was opposed to the Samnites on the right wing, and Decius to the Gauls on the left wing. The course of the
Bk. 10. fight was by no means similar on the right and the left wing, says Livy. The Romans under Fabius rather repelled than offered assault and the contest was prolonged until very late in the day, for their general knew very well that both Samnites and Gauls were furious in the first onset, so that to withstand them would be enough, and that, in a protracted contest, the spirits of the Samnites gradually flagged and even the bodies of the Gauls, remarkably ill-able to bear labor and heat, became quite relaxed and, although in their first efforts they were stronger than men's, yet in their late efforts they were weaker than women's. Fabius therefore reserved the strength of his men as unimpaired as possible, until the time when the enemy were the more likely to be worsted.

[3, 4] Decius, more impetuous, as being in the prime of life and full flow of spirits, exerted whatever force he had to the utmost in the first encounter, making an attack on the enemy which did not succeed, for his troops were put to flight early in the conflict and scattered. Then, as he could not rally them, he determined to win the glory which he could not get through victory by imitating the example of his father Publius Decius and devoting himself and the legions of the enemy to the infernal gods on behalf of the army of the Roman people, the Quirites; and, wherever he saw the line of the Gauls thickest, he spurred forward

his horse and, rushing upon the enemy's weapons, met his death. And the Romans, on the loss of their general—an event which on other occasions inspires terror—stopped their flight and set about beginning the combat afresh; and, when supports reached them which, on the orders of Fabius, had been sent from the rear to support his colleague, they won the victory.

[5] And the consul Titus Veturius, when despatched against the Volscians, copied the example of Fabius. He stirred up the enemy to an engagement, they having a considerable advantage in numbers. But he did not advance his forces or allow them to return the enemy's shouts, but bade them stand still with their spears fixed in the ground and, when the enemy came to close quarters, the cohorts were then to fall to it with their swords and with their full strength. That is a very fierce kind of fighting. The Volscians, weary with running and shouting, set on the Romans as if these were quite benumbed by fear, but after they found what a vigorous resistance was being made and saw the swords glittering before their eyes, they turned their backs in great disorder, just as if they had been ambushed. Nor had they strength sufficient even for flight, because they had advanced to the battle at full speed. The Romans, on the other hand, because they had not stirred from their ground in the beginning of the action, being fresh and vigorous, easily overtook the wearied fugitives, carried their camp by assault, and after driving them thence pursued them to Velitræ, into which the conquered and the conquerors entered in a body. Livy, bk. 2.

[6] In like manner the dictator Aulus Cornelius Cossus, just before engaging with the Volscians, who had a large army, addressed his troops as follows:

" The day, my men, is ours, if either the gods or their prophets can foretell future events. Therefore, as resolute men of assured hope and such as shall encounter with far meaner than ourselves, pitch we our javelins down at our feet and draw our swords only. Neither would I have you to charge out of the main battle, but to keep your ground, to stand steadfast, and abide the first shock of the enemy. And when they have spent their volley of shot in vain, and shall in full torrent come upon you as you stand, then let your swords glitter in their eyes, and think every man of the gods that they will help the Romans, the gods, I say, who in auspicious hour have sent us forth into the field of battle."

The troops fought as he had charged them; the general had not duped his legions, and fortune did not dupe the general. Pompey, too, Livy, bk. 6. adopted this plan and, just before engaging with Cæsar at Pharsalus, bade his men await Cæsar's attack and not budge or allow their line to be broken. And this he is said to have done by the advice of Caius Triarius, that the impetuosity of the charge of Cæsar's soldiers might be checked and their line broken; and he thought that the javelins would

fall with less force if the soldiers were kept in their ground than if they met them while themselves in movement; at the same time he trusted that Cæsar's soldiers, after running over double the usual ground, would be out of breath and exhausted by fatigue.

[7] Cæsar was of opinion, however, that herein Pompey acted without sufficient reason, for there is a certain impetuosity of spirit or an alacrity implanted by nature in the hearts of all men, which is inflamed by the desire to meet the foe in fight. This a general (Cæsar says) should endeavor not to repress but to increase, it not being a vain institution of men of old that the trumpets should sound on all sides and a general shout be raised, for they thought that this struck the enemy with terror and inspired their own army with courage.

Caes., Gallic war, bk. 8.

[8] Thus the Gauls and Germans, who were men of reckless wrath and passion, had the custom, when they were preparing to attack the enemy, of raising a wild, discordant song called *harritus*, and of shrieking and jumping about and brandishing their shields, and they used to forecast the result of the coming fight hereby.

[9] The Syrians did the same at the commencement of an attack: after an act of worship of the sun, they had their signal trumpet sounded for the joinder of battle, and then they raised a most excited shout in order to inflame their ardor as they rushed to the onslaught and delivered their attack. If, however, the noise they gave out were harmonious and not irregular and conflicting and discordant, it would not sufficiently stimulate their courage for the battle or betoken a coming victory, for each man's determination and courage was gauged by the pitch of excitement and insistence to which he was raised by the presence of the enemy, and this afforded an unquestioned indication of the way the fortune of battle would go.

Bk. 4.

And Livy mentions the same kind of thing in connection with the battle which the consul Caius Sempronius so rashly and ill-advisedly fought with the Volscians:

" The first token which way victory would incline," says he, " was the manner of shout at the first charge: which by the enemy was more loud, more shrill and continual, but by the Romans dissonant, unequal, dead and cold, often begun and often renewed: and by their uncertain and variable noise they bewrayed the inward fear of their hearts."

[10] Now Cyrus' plan was the following. If the enemy attacked in a tumultuous fashion his soldiers were to receive their onslaught in silence; but if the enemy attacked in silence, his line of battle was to advance with shouts and din. It certainly makes a vast difference, however, whether you have to deal with raw soldiers, who are susceptible to the slightest unusual noise and impression or with seasoned veterans who are not usually frightened by trifles.

Alex. ab Alex., Genial. dies, bk. 4, ch. 7.

Chapter X.

It is not prudent to attack a state which is torn by civil dissension merely in reliance on that fact.

1. Civil discord renders a State mortal which otherwise would be immortal.
2. Dissensions of enemies to be fomented.
3. Enemies not to be attacked because of their dissensions.

[1] Men of old held the well-founded opinion that a great state is immortal if its citizens abstain from the madness of civil strife, for experience shows that to be the one poison and weakness which brings to ruin the greatness of flourishing states. An example of this is furnished by the Roman State, which was so long the ruler of the whole world, until its strength was worn out in civil and intestine wars and it sank to nothing.

[2] Prudent generals, accordingly, make a practice of fomenting the dissensions of their enemies whenever they have the chance, so that in this way they can overmaster the strength of their enemy by a bloodless victory. It was in pursuit of this policy that Marcius Coriolanus, in his approach to the city, when laying waste the territory of Rome, ordered the lands of the patricians to be spared so as to render them objects of suspicion to the plebeians and thus intensify the civil dissension which had already begun. And when Hannibal saw that Quintus Livy, bk. 1. Fabius, making war by reason and not by chance, was robbing him of Dion. Halic., bk. 8. victory by his astute policy of delay (which, however, brought him into contempt at Rome, where he was called timid)—in order to increase the unpopularity of Fabius, he ordered that no hostile measures were to be taken against his estate, although the property all round it was leveled with the ground, so that this might seem to be a price agreed on in some secret arrangement. And Fabius, in order to avoid this unpopularity, Livy, bk. 22. is said to have sold that estate and to have devoted the proceeds to the ransom of prisoners. Herein he imitated Pericles, for the Spartans ordered his estate to be exempted from the general devastation, in the hope that he would either fall into danger by unpopularity or into infamy by the suspicion of treachery; but Pericles had anticipated their intentions and foretold them to the people, and in order to turn aside the attacks of malice he had presented these very properties to the State. Thus the danger in which he had been placed was turned into the greatest Justin, bk. 3. glory.

[3] Further, it would not be a well-advised policy to attack an enemy in reliance merely upon his internal dissensions, for (in Livy's words) pressure from without is the best cement of concord within. And so it befell when the Prænestines imagined that the dissensions of the Romans were providing them with an excellent opportunity. They made a hasty march, laying waste the country as they went along, and advanced their standards as far as the Colline gate. The panic in the city was great: the alarm was given to take up arms: people ran together to the walls and gates. But in the end they turned from their dissensions with one another to war and appointed Titus Quinctius Cincinnatus dictator. And when this got abroad (so great was the terror of that office) the enemy retired from the walls and the younger Romans assembled to the edict without demur. For terror from without represses civil discords.

Livy, bk. 6.

And so when Cæsar was campaigning against Britain, the Britons unanimously conceded full powers and the conduct of the war to Cassivellaunus, although previously perpetual wars had taken place between him and the other States; but Cæsar's arrival so alarmed them that they intrusted him with the whole war and command.

Caes., Gallic war, bk. 5.

In the same way during the war with Veii, in the consulship of Cnæus Manlius and Marcus Fabius, the minds of the soldiery were so embittered by domestic dissensions that the consuls abode in their camp and did not venture to hazard a battle, for they could not trust their men with arms; and the enemy, in reliance on this, tried in every possible way to worry the Romans into a fight by indignities and insults. The Romans at last could not endure the shame any longer and the competition between external and internal hatred ended in favor of the former, so disdainful and insolent was the mockery of the foe. And so the soldiers formed in battle line, enraged against the enemy and reconciled to each other, and Livy says that the Romans never joined battle in any previous war with bitterer hostility; while, had the enemy restrained themselves, they could quite easily have conquered the Romans with their own strength and soldiery.

Bk. 2.

The Æquians and Volscians furnish another example. They had made a joint incursion into Roman territory, and then a dispute arose whether the Æquians or the Volscians should supply a leader of that force, and out of that dispute a fierce dissension sprang and a fight took place in which the enemy wrought havoc on each other in a deadly and obstinate manner, so that they allowed the Romans to carry off the victory.

Livy, bk. 2.

Dion. Halic., bk. 8.

And so when Scotio, the Dacian commander, learned that the Roman people were torn by civil strife, he did not think this an opportunity which ought to be seized on for harassing them, for he perceived that an external war is often the means of extinguishing an intestine war;

and he repressed and restrained his men's ardor for a fight in a neat manner, by instituting a comparison with two dogs which he brought before their eyes and then, when these dogs had been fighting with each other for a little while, he introduced a wolf and at once the dogs dropped their anger against each other and keenly attacked and put an end to their common foe. Cœl. Rhodig., dig. lect. antiq., bk. 9, ch. 50.

CHAPTER XI.

Troops to be so placed, by all possible endeavors, that fighting is an absolute necessity for them; but the enemy should be afforded an escape from that necessity.

1. The force of necessity.
2. The soldiery to be compelled of necessity to fight.
3. The opportunity of flight to be taken away from the soldiery, so far as possible.
4. The enemy to be afforded opportunities to avoid the necessity of fighting.
5. The enemy to be provided with an avenue of escape by flight.

[1] How great the force of necessity is has been sufficiently discussed by the philosophers, for they hold that all things are ordained by Necessity. And so when Thales was asked what was the strongest thing, he replied, "Necessity, for it alone can not be overcome."

[2] And the most noted generals, by reason of their perception of its force and inherent virtue and in view of its great effectiveness in all departments, and especially in war, and of the access of courage which it produces, make a practice of carefully insuring that their soldiery may be driven by necessity to fight: for, as Quintus Curtius said, necessity comes before reason, especially in war.

So, too, the dictator, Quintus Fabius, after keeping his men within the rampart for several days after a drawn battle with the Samnites, like one besieged rather than a besieger, suddenly displayed the signal for battle. He judged it the more efficacious method of inflaming the courage of brave men to let none have any room for hope but in himself, and so he kept secret from the troops the arrival of the master of the horse and a new army; and, as if there were no safety but in fighting their way out, he made a speech pointing out to the troops the confined nature of the situation and the dearth of supplies, and said that there was no way out for them except what a victory would open. He then ordered the camp to be burned lest they should retreat thither, as on the former day, without completing their victory, saying that fortifications ought to be secured by arms, not arms by fortifications. Then the soldiers advanced against the enemy with spirits roused by the dictator's address, which seemed to indicate the extremity of need; and the very sight of the camp in flames behind them was no small incitement to victory. Livy, bk. 9.

And so also when Marcus Porcius Cato was campaigning in Spain, he marched his army round to a place at some distance from his ships and camp, where their only hope would be in their own valor, and he

joined battle in the very center of the enemy, addressing his soldiery as follows. "Men," quoth he, "there is no other hope now left but in clean strength and valor, and I of very purpose have wrought it so. Between us and our camp the enemies are encamped all; behind at our back we have our enemy's land. The bravest courses are ever safest, namely to build and ground our hope surely in valor." Livy, bk 34.

And after Hannibal's passage of the Alps, when he was on the eve of a battle with Scipio, he showed his men the absolute necessity of fighting, in the following speech:

"On both hands, right and left, inclosed we are by two seas, and we have not so much as one ship to escape away in. Before you, near at hand, is the Po, a greater river and more violent than the Rhone; behind you, to hem you in, are the Alps, which you hardly passed over when in heart and lusty. Here, men, you must either get victory or lose your lives, even where you first encountered the enemy; and the same fortune which has laid upon you the necessity of fight proffers unto you (if you go away with victory) such rewards as men use not to wish for greater and more honorable at the hands of the immortal gods. The Romans have sent over this year already two consuls, one into Africa and the other into Spain; nothing have they left for us but that which we can win and hold at the sword's point. Well may they be timid and idle, having a place of refuge to retire into, who in their own country and ground may be received when they take to their heels through safe and peaceful paths to save themselves. But as for you, it stands you upon to play the men and to make account of no middle designs between victory and death, but, upon certain despair of all shifts besides, either to obtain victory or, if fortune shall fail us, choose rather to die fighting than to be killed flying. If this be settled and deeply resolved in your hearts, I will say once again, The day is yours."

No sharper spur to conquest, says Livy, has been given to men by Bk. 21. the immortal gods. And so when the Volscian general, Vectius Messius, saw that his troops were hemmed in by the Romans on all sides, he shouted out to them with a penetrating voice:

"What, will ye here, without making your defense, without revenge, offer yourselves to be devoured of the enemy's sword? What do you, then, with weapons? Why began ye war first? Are you troublesome and unruly in peace and cowards in war? What hope have ye in standing still? Do you look for some god to protect and deliver you? You must make way by dint of sword. Come, then, and that way where ye shall see me go afore follow ye after and stick to it like men, as many of you as mind to see again your home, your parents, your wives and children. It is neither wall nor trench, but armed men that must withstand armed men. In valor ye are their matches, but in necessity (which is the last and strongest engine of all other) ye are the better." Livy, bk. 4.

[3] Further, just as the most noted generals would so place their troops that fighting was an absolute necessity, so they would employ various methods to take away from them the chance of flight. Thus Cæsar, before engaging in battle with the Helvetii, first removed his horses from his own sight and then from the sight of everybody, and harangued his troops, pointing out that all were now in equal danger and urging them to put away all hope of flight; and this was a common custom with Cæs., Gallic war, bk. 1 the Helvetii. When the tyrant Agathocles crossed into Africa, he had all his ships burned with the assent of his troops, so that all might know that they had nothing to hope for from flight and must therefore either Justin, bk. 22. conquer or die. When Astyages, King of the Medes, was fighting with Cyrus and the Persians, he posted part of his troops in the rear and bade them put fugitives to the sword, just like enemies, and had a proclamation made to his men that, if they did not conquer, they would find just as strong men behind their backs as in front of them, and so his troops Justin, bk. 1. derived from this necessity a large accession of courage. And the Romans not infrequently had their fugitives put to death just as if they were enemies.

And very often great advantage accrued from the wholesome device which we read of as much resorted to by the Romans in times of great alarm, and of severe stress and despair: namely, to post squads of cavalry in front of the fortifications with orders to treat as enemies those who were sufficiently ill-advised to flee from the battle back to the camp, and to attack them with swords drawn, so that they should see a hostile array behind them as well as in front. This final counsel of despair at times so inflames the courage of soldiers as to restore lines that have yielded and been scattered in disgraceful flight, so that the troops, under the coercion of a twofold fear, have not seldom snatched victory out of the hands of the enemy.

[4] That same principle, however, which suggests the expediency of throwing on troops the absolute necessity of fighting, demonstrates the expediency of removing this necessity from the enemy; for it often happens that despair turns into valor, as in Virgil's line,

> Una salus victis nullam sperare salutem.
> (The sole safety of the conquered is to abandon all hope of safety.)

And so in the war with Veii, the enemy at one time set off to storm the Roman camp with troops withdrawn from the fighting line: and thereupon the consul Cnæus Manlius rode back to the camp and posted troops at every gate in order to bar the retreat of the enemy; but the despair thus created rendered the enemy rather mad than bold, so that the consul was killed and their onset could not be any longer withstood, Livy, bk. 2. Dion Halic., bk. 9. and matters would have reached the worst extreme if the legates had not opened a way for the enemy to escape by one gate. And so the

opinion of Scipio has been deservedly praised, i. e., that a way for the enemy to escape by should always be provided.

[5] For (as Tacitus says) the more hope the mind cherishes the less inclined will it be to offer resistance, seeing that necessity gives an edge even to cowardice, and despair is often the parent of hope or, at any rate, is a great incitement to an honorable death. And so when the Greeks were eager to prevent the crossing of Xerxes after his defeat in battle and to cut off the King with his army, Themistocles, fearing that his enemy, if thus cut off, would turn their despair into a virtue and would hew with the sword a way which would not be open to them otherwise, acted with much wisdom, when he found himself unable to bring the others to his view, in sending a slave to Xerxes with the warning to effect a crossing by a timely flight. Justin, bk. 2.

And the conduct of the dictator Marcus Furius Camillus, at the siege of Veii, was also shrewd. A mine had been driven through the citadel of Veii through which he had sent picked soldiers and had filled the city with his soldiers, and there was general fighting; then a great slaughter took place whereby he facilitated the capture of the town, and, when the ardor of the fight had abated, the dictator ordered the heralds to proclaim that the unarmed should be spared. In this way an end was put to bloodshed and, laying down their arms, the enemy began to surrender. Livy, bk. 5.

The same thing happened when the colony of Fregellæ was occupied by the Samnites after a sudden surprise in the night. The Fregellans contrived to maintain the battle for a considerable time without loss of ground, both because they fought for their religion and liberty and because the multitude unfit to bear arms assisted them from the tops of the houses. At length, says Livy, a stratagem gave the advan- Bk. 9. tage to the assailants, for they suffered the voice of a herald to be heard proclaiming that whoever laid down his arms might retire in safety. This relaxed their eagerness for the fight and they began almost everywhere to throw away their arms.

Caius Fabius Ambustus resorted to the same stratagem at the storming of Auxur, when the battle was continued, despite the capture of the city, by a large number of the defenders because they had no hope of quarter; so he suddenly gave orders for a proclamation to be made that none but the armed were to be injured. He thus induced all the remaining multitude voluntarily to lay down their arms, and in that fashion gained an easy victory. Livy, bk. 9.

A similar thing happened at Sutrium, a city in alliance with the Roman people. On the same day on which it was stormed by the Etruscans it was unexpectedly recaptured by Camillus; he ordered the gates to be shut on the Etruscans, who were cut down in every quarter; all hope of flight was thus taken away; but (Livy tells us) the battle would Bk. 6.

have been renewed and kindled by the despair of the enemy had not heralds, sent in every direction through the city, issued orders that their arms should be laid down, that the unarmed would be spared, and that none but those carrying arms would be injured. And then even those whose minds had been, in their last hope, obstinately bent on fighting, when hopes of life were offered threw down their arms in every direction and surrendered themselves, unarmed, to the enemy, which fortune had rendered the safer course.

Cæsar, too, at the battle of Pharsalus, when Pompey's battle-line had given way, adopted a very well-advised plan in order to prevent the soldiers from restoring their ranks, and with a view to obtain a more easy victory he sent heralds in all quarters to proclaim to his troops that they must spare their fellow-citizens and only wreak their wrath on the mercenaries. And whenever the victors came across the vanquished, they bade them, " Abide in safety," whence that expression " Abide in safety " (*sta securus*) got to be a kind of watchword. And Cæsar thus gained his victory.

Appian, Civil war, bk. 2.

The admonition given by Lycurgus to his own people also points in that direction, namely, if ever they routed and overthrew an enemy in battle, only to pursue the fugitives far enough to secure the victory and then immediately to withdraw—not only because it was un-Greek to slay surrendered enemies, but also because of the utility of that course, for if the enemy knows that quarter will be given on a surrender their distaste for being killed will make them discover the advantages of flight over fight.

Plutarch, Apoph.

CHAPTER XII.

In time of victory the first and chief thought should be about peace.

1. We are better able to bear bad fortune than good fortune.
2. Neither prosperity nor adversity to be borne in ill-restrained manner.
3. In time of victory peace to be insured.
4. Nothing in war more miserable than a victory.

[1] It is clearly a provision of nature that we can better bear bad fortune than good. For (as Tacitus says) prosperity probes the soul with sharper goads than adversity, since we tolerate wretchedness, but are corrupted by happiness. It was the recognition of this that led Abdolominus, who though of royal stock was very poor and needy and who had been made king by the Sidonians with the permission of Alexander, to make the following reply to Alexander's question how much patience he needed to bear poverty: "Would that I could endure a kingdom with the same amount." And Alexander the Great himself fur- Q. Curtius, bk. 4.
nishes a good example of this same thing. For before Fortune emptied itself into his heart, he bore the beginnings thereof with moderation and wisdom, but he failed to bear its full development fitly. For it continu- Q. Curtius, bk. 4.
ally happens that the soul of a man gets so puffed up by prosperity that he can not then bear either any others or himself. No trust, then, should be reposed in even the greatest degree of prosperity, for it is uncertain what the evening will bring forth.

[2] It is accordingly just as much a mark of extreme weak-mindedness to bear prosperity immoderately as adversity; and their admonitions are clearly well founded who bid us, in proportion as we are lofty, to bear ourselves lowly. For (to quote Cicero), just as men send their Offic., bk. 1.
horses to trainers when they get wild and mettlesome by reason of the frequency of combats, in order that they may manage them with greater ease, so men who have shown themselves unbridled and overweening in prosperity ought to be taken to the training-ground (so to speak) of reason and instruction, in order that they may learn the frailty of human affairs and the mutability of fortune; for the failure to impose a limit on happiness and to repress good fortune when it presents itself involves a ruin as disgraceful as the degree of elation was undue.

[3] And so in times of victory, which otherwise are times of insolence and pride, the first and chief thing to be thought of is peace; nor should this be delayed (as Demades used to say of the Athenians when

they were given up to an untimely lust of war) until we have to beg for it in mourning. For nowhere less than in war do events turn out as they are expected to. Accordingly when Mago, who had come to Carthage to announce Hannibal's victory at Cannæ, was granted audience by the Senate and was extolling in profuse style his brother's prosperity in Italy and was urging that the nearer the prospect of finishing the war was the more readily should aid be sent with all confidence to Hannibal, Hanno, who had always deprecated the undertaking of war against the Romans, remained quite unmoved thereby and wisely urged the Senate to consent in that time of prosperity to make the most of their fortune and to think on peace rather than on war. " For," said he, " if you let slip this advantage of the time when we may seem to give rather than to take conditions of peace, I fear that even this so goodly a show of growth as it maketh now will run up all to straw and bear no head to yield corn in the end."

Plutarch, On the preservation of health. Livy, bk. 23.

Now this attitude was scorned at the time, but afterwards, though too late, it was praised in vain by the Senate, at a time when they were reduced so low that the terms of peace, which they could have imposed, were begged for by themselves, and refused, and they were in that condition which Livy tells us of in relation to the Latins, i. e., that they could endure neither peace nor war, a condition which is of all things the most miserable. The same thing happened to Antiochus, who treated for peace when the Romans had already crossed over into Asia to campaign against him. The reply of Scipio was that this ought to have been done at an earlier date and not now when the King was bitted and mounted.

Plutarch, Apoph. Appian, Syrian war. Livy, bk. 37.

A wise man, then, will not put away a sure peace that is in the victor's hand in the fallacious hope of an uncertain victory that is in the hand of fortune. And so when Hasdrubal Hœdus, the legate of the Carthaginians, was treating for peace in the Roman Senate, he said that men were seldom gifted with good fortune and good intelligence at the same time and that the Roman people were unconquered because they knew how to be wise and take good counsel in times of prosperity, and that if in times of good fortune the gods gave us good wit, we should reflect not only on what had happened, but also on what might happen.

Familiar Epistles, bk. 4, Epist. 3.

[4] And Cicero, in a letter to Marcellus, says: " Though everything in war is miserable, yet there is nothing more miserable than victory itself, for even if this befalls the better-disposed, it yet renders them fiercer and more headstrong, so that, even if they have not these qualities by nature, they are of necessity made to have them.

And so Cæsar, mindful of this weakness of the human soul, said that the only time for discussing peace with Pompey was the time when each of them had confidence in himself and seemed the equal of the other, but that, if fortune gave ever so little an advantage to one of them, he who seemed to be getting the upper hand would have nothing to do with terms of peace and would not be content with equal shares, seeing that he would rely on getting the whole.

Cæs., Civil war, bk. 3.

Chapter XIII.

After the enemy has been crushed, what is the best method for keeping him quiet in a lasting peace.

1. Not less valor needed in order to retain what has been won than to win it.
2. The advice of Herennius Pontius concerning the Romans, who were surrounded at the Caudine Forks.
3. The opinion of Camillus with reference to the conquered Latins.
4. The pronouncement of the Senate concerning the men of Privernæ who had been compelled to surrender.
5. The opinion of Marcus Cato on rebels.
6. The Romans allowed their allies to make war only under Roman leadership.
7. The custom of founding colonies.

[1] Seeing that there is not less virtue in preserving what we have gained than in acquiring it, and in the right use of victory than in victory itself—for as Ovid rightly says:

> Casus inest illic, hic erit artis opus
> (Chance controls the one, but in the other there is need of skill)

—and seeing that the object of war is to live in peace, our whole thought, after the enemy has been crushed, should be by what best means to restrain him forever from making war again. For what good was it to Pyrrhus to be great in crushing an enemy if he could not guard what he had gained? So much more successfully did he set himself to acquire dominion than to keep it! On this account he was compared by Antigonus with an unskilled gamester who, though he makes many good throws at dice, yet does not know how to make the best of his game. Justin, bk. 25.

[2] And in this connection I think that by far the most useful advice was that given by Herennius Pontius, father of Caius Pontius, at the time when the Samnites, under the leadership of Caius Pontius, had enticed the Romans by fraud into the Caudine Forks between two defiles: for the Samnites had no plan prepared for these joyful circumstances and so they determined that the advice of Herennius Pontius should be sought. Herennius, accordingly, was consulted by a messenger from his son and he gave it as his opinion that all the Romans should be set free from there as soon as possible without receiving any hurt. On this counsel being rejected, and the same messenger returning a second time for his advice, he recommended that they should all without exception be put to death. The meaning of his first plan, which he esteemed the best, was that by an act of extraordinary kindness perpetual peace and friendship should be established with a most powerful nation; and by his second plan he meant that the renewal of the war should be

put off to the distance of many ages, during which the Roman State, after the loss of these two armies, would not easily recover its strength. A third plan, he said, there was not.

And when his son and the other chiefs went on to ask him if a plan of a middle kind might not be adopted, i. e., that they should be dismissed unhurt and at the same time that terms should, by right of war, be imposed on them as vanquished: "Marry," quoth he, "this is the way indeed that neither winneth you friends nor yet riddeth you of your foes—to save them whom ye have provoked with shame and disgrace. The Romans are of this nature, that they can not sit still and be quiet so long as they have the worse—that is what will ever be fresh in their hearts whatsoever shame the present extremity shall fix upon them, and never will it give them any rest before they have been by manifold ways revenged of you."

Neither opinion, however, was adopted, and the Romans were sent under the yoke and that notorious peace of Caudium was made. But it was subsequently repudiated by the Senate on the ground of informality and the authors of it were surrendered to the Samnites. This people then found that they had got a renewal of a most bitter war instead of an arrogant peace and all the results thereof were not only brought to their notice, but took place almost under their very eyes. Too late and vainly did they then praise both plans of old Herennius, by blundering between which they found that they had trafficked the possession of victory for an uncertain peace and had let slip the opportunity alike for kindness and for severity, and had to fight with those whom they had had it in their power either to destroy as enemies or to convert into friends. Livy, bk. 9.

[3] The conduct of the Romans was wiser, for when Camillus, after the defeat and subjugation of the Latins, was taking the instructions of the Senate with regard to their treatment, he is said to have held the following discourse:

"It now remains to be considered, since they annoy us by their repeated rebellions, how we may keep them in quiet and in perpetual peace. The immortal gods have put the determination of this matter so completely in your power that they have placed it in your hands whether Latium shall continue to exist or not. Ye can therefore insure to yourselves perpetual peace as far as regards the Latins, by adopting either severe or lenient measures. Do ye choose to adopt cruel conduct toward people who have surrendered and been conquered? Ye may destroy all Latium and make a vast desert of a place whence in many and serious wars ye have often obtained the use of an excellent army of allies. Do you wish, according to the example of your forefathers, to augment the Roman State by admitting the vanquished among your citizens? Materials for extending your power with the highest glory are at hand.

That government is certainly by far the most secure which the subjects find a pleasure in obeying. But whatever your decision is, it must be speedy. So many States have ye with their minds in a suspense between hope and fear, and it is necessary that ye be quit as soon as possible of your solicitude about them and that their minds, while they are still in a stupor through expectancy, be impressed either by clemency or by punishment."

Thus Camillus.

The Senate praised his exposition of these affairs of high policy, but said that, as the States were differently circumstanced, their plan should be so adjusted that a determination might be arrived at according to the deserts of each, the question being put regarding each State separately. This was, accordingly, carried out under a decree of the Senate, and to some the right of citizenship was granted, with a restoration of the exercise of their religious rites; to others the right of citizenship which they already possessed was continued, their offense not being imputed to public wrong-doing, but to the few ringleaders; others had their walls razed and were ordered to find a dwelling elsewhere. Livy, bk. 9.

[4] The memorable pronouncement of the Senate in the matter of the Privernians is also relevant here. They had been driven to make surrender and their walls had been razed under a decree of the Senate, and their leader Vitruvius had been put to death together with some sharers of his guilt; and the consul Plautius had referred to the Senate the question, what to do with the rest of the multitude. Then one of the Privernian envoys, more mindful of the prospects to which he had been born than of present exigencies, when asked by one of the Senators, what punishment the Privernians had, in his opinion, deserved, answered, "Such as those deserve who deem themselves worthy of liberty." And when the consul saw that this stubborn answer the more exasperated those who were adverse to the cause of the Privernians, he asked him, with intent to draw from him a more conciliatory reply by means of a favorable question, "But if we remit to you the punishment, in what manner may we expect that ye will observe the peace which shall be established between us?" He replied, "If the peace which ye grant us be a good peace, it will be observed as both inviolable and eternal: if bad, as one of no long continuance." These words roused the anger of some, but the better part of the Senate interpreted his answer more favorably and said that what they had just heard were the words of a man, and a free man. And they asked whether it was credible that any people, or even an individual, would remain longer than necessity constrained in a situation which irked him so acutely. Peace, said they, was observed only when those at peace were voluntarily so, but fidelity was not to be expected where it was wished to impose slavery. And so by the authoriza-

tion of the Senate a proposal was laid before the people to grant rights of citizenship to the Privernians. Livy, bk. 8.

[5] Marcus Cato, however, held that rebels could best be kept in their duty by making it impossible for them to rebel. And so he disarmed all the Spaniards this side the Ebro and razed all their walls on one and the same day. But this they took so much to heart that many committed suicide, a proud people not reckoning life worth living without arms. Livy, bk. 34. And in this Cato seems to have followed the example of Cyrus, who, when the Lydians again broke out into war, took away their arms and horses, and ordered them to ply the trades of the tavern-keeper, the public player, and the pimp. And in this way they became effeminate by soft living and lost their former manhood, and those whom war, before the time of Cyrus, had made invincible, ease and sloth conquered when they had fallen into habits of luxury. Justin, bk. 1.

Now, after the capture of Saguntum, Hannibal ordered the slaughter, on a given signal, of all over the age of puberty. And this certainly was (as Livy says) Bk. 10. a ruthless decree; yet the event showed that it was almost a necessity; for how could quarter be given to persons who either shut themselves up with their wives and children and burned their homes over their own heads or who, in the fighting line, did naught before the close of the engagement save what people would do who desired death? And this is clearly the meaning of the saying of Agesilaus, that it is hard to be at the same time both merciful and wise. Plut., Apoph.

[6] Again, the Romans, in furtherance of the policy of removing from their allies all opportunity of rebellion, thought it inadvisable to allow them to make war with their own army and strength and plans, or except under Roman leadership. Dion. Halic., bk. 8. And so when the Æquians invaded Latin territory and the spokesmen of the Latins requested the Senate either to supply help or allow them to take up arms and protect themselves, it seemed more expedient to defend the Latins, keeping them unarmed, than to allow them to take up arms again. Livy, bk. 2.

It was also an ancient custom of the Romans, in connection with those with whom friendly relations had not been established by treaty or on equal terms, not to exercise sovereignty over them on a peace footing before they had made a surrender of all things, human and divine, and hostages had been received, and their arms had been taken from them, and garrisons had been stationed in the towns. Livy, bk. 8.

[7] It was another custom of the Romans in the course of their subjugation of this or that people of Italy, to sequestrate part of their soil and settle a colony in it, or in the case of already founded towns to enrol new colonists of a special variety; and these colonies were stationed, like garrisons, in the provinces which had been acquired in war. Dion. Halic., bks. 2, 4 and 5. Appian, Civil war, bk. 1. And so Sylla, in prudent albeit tyrannical fashion, after he had made himself supreme in the State by force of arms, despatched those who had worked

on his side in that war, as colonists into the lands and towns of those who had striven against him; and these persons, quartered in convenient places, kept Italy subject to his power and the landed estates were shifted from their former owners to them. This boon rendered them submissive to him for their whole lives and established his dominion in a marvellous manner, for, inasmuch as they could not assert their own claims except by ratifying the acts of Sylla, they became champions of his dignity even after his death; and those whose citadels and walls and goods and immunities they had taken away were prevented, by lack of resources, from hurting them. Appian, Civil war, bk. 1.

Again, after the defeat of Perseus and the decree for Macedonian freedom, the Romans ordered that the King's friends and high officials, generals, naval and garrison commanders and all other subordinate officials whose habit it was to serve the King with humility and lord it over others, should quit Macedonia and migrate into Italy, so as to prevent them from compassing fresh schemes in Macedonia. Livy, bk. 45. And this seems to have been the purpose of Lycurgus in those laws of his called Retræ, in which he forbade the frequent repetition of war against the same people, lest they should learn the Spartan tactics. And so when Agesilaus had been carrying on a continuous war with the Thebans and fell wounded in a certain battle, it is reported that Antalcidas said to him, "You are getting a fine payment from the Thebans for teaching those who did not know how to fight": and in truth history says that the Thebans were never more bellicose than at that time, owing to the oft-repeated expeditions of the Lacedæmonians against them; for the fortune of war (as Plutarch, Apoph. Quintus Curtius said) imparts skill even to the conquered.

BOOK THE THIRD

Of the Law and Duties relating to War and of Military Discipline.

CHAPTER I.
Of military discipline.

[1] History tells us how great the importance of military discipline is: so does daily experience; and it is abundantly clear that the conquest of the world by the Roman people was accomplished by nothing else than the training in arms, the discipline of the camp, and the practice of campaigning. Quintilian puts this very well when he says: Vegetius, de re milit., bk. 1. Livy, Preface to his History. On the soldier Marian.

"Rightly considered, the empire of the Roman people has been based until now on military discipline; for we are not more numerous than the Cimbri, or possessed of greater resources than very wealthy kingdoms, nor is contempt of death easier to us than to most barbarians, though they may have no great inducement to live. It was the sternness of our institutions, our system of military service, our love of toil, our daily exercisings, and our assiduous consideration of questions of war."

And so Valerius Maximus said that there was no bond so lasting as that of military discipline, that preëminent adornment and buttress of the Roman power, in whose bosom repose the serene and tranquil blessings of peace. Bk. 2, ch. 7.

[2] And indeed we read how numerous armies of slaves and unwarlike recruits have been made invincible and warlike merely by discipline and command and, on the other hand, how numerous armies of seasoned troops, hitherto unconquered, have been corrupted and sapped merely by license and by all their vices and by the neglect of discipline, and have been undone before ever they set eyes on the enemy. And a proof of this is furnished by Tullus Hostilius, King of the Romans, who roused the Romans to war after they had lived forty years of peaceful ease, and merely by means of military discipline rendered them excellent soldiers, though previously they had had no experience of it. And Tiberius Sempronius Gracchus, who had an army of slaves given him, in a short time, by dint of military training and system, brought it to pass that, when they were in battle-array, no one ever thought about their Livy, bk. 1.

race and origin, and that they were a protection to the allies and a terror Livy, bk. 26. to the enemy. So, also, after Thebes had been freed from its subjection to the Spartans, Pelopidas and Epaminondas, by means of military institutions, had no difficulty in turning the Thebans from unwarlike men into excellent soldiers, so that they were not only the equals but the superiors of the Spartans.

Now Scipio Æmilianus, that excellent commander and consummate master of the art of generalship, in order to break the high courage of the city of Numantia, which had been but fostered by the faults of his predecessors in the command, is said to have had two thousand harlots and everything else which merely ministered to pleasure removed from his camp directly he entered it, and in that way to have repaired the failure of military discipline. By this method he succeeded in burning and throwing down in ruins level with the ground that courageous and Bk. 2, ch. 7. haughty Numantia; and so (as Valerius Maximus says) for having neglected military discipline Mancinus saw himself compelled to make a deplorable surrender and Scipio, for having preserved it, obtained as recompense the most brilliant triumph.

And Metellus followed Scipio's example by restoring military discipline into the army which he took over from Spurius Albinus, when in Africa during the Jugurthine War, and which the latter had spoiled by excessive indulgence. It is said that he began by issuing a proclamation banishing everything that conduced to cowardice; and he won a glorious Val. Max., bk. 2, ch. 7. victory over the enemy.

And when Scipio Africanus the younger was despatched as consul into Africa and saw the corrupt state of discipline and the slothful plundering and greedy habits which the troops had developed under Piso, he realized that he would never conquer the enemy until he had got his own men in hand; so he severely rebuked them in a great speech and drove away all non-soldiers and re-established military discipline, and thus succeeded in overthrowing the powerful Carthage, the rival of Rome's Appian, Punic war. empire.

[3] The army of Hannibal, on the other hand, which had so often and so long endured every human ill and had never known or been accustomed to comforts and had not been sapped by the virulence of any evil, was ruined by the excessive comforts and pleasures of the immodest Capua. For sleep and wine and feastings and harlots and baths and ease (which by wont grows daily more agreeable) so enervated their bodies and souls (says Livy) that it was their victorious past that kept them safe and not their present strength.

And in this the general is considered by those who are skilled in the art of war to have committed a greater error than in not marching his troops to Rome forthwith from the field of Cannæ. For his delay on that occasion might be considered as only to have postponed his victory,

but this mistake to have deprived him of the power of conquering. Accordingly, by Hercules, it was as though he marched out of Capua with another army, for it retained in no respect any of its former discipline. For most of the troops returned in the embrace of harlots and as soon as they began to live under tents, and the fatigue of marching and other military labors tried them, they broke down, like recruits, both in bodily strength and spirit. From that time, during the whole period of the summer campaign, great numbers of them slunk away from the standards without furlough, although there was no other lurking-place for the deserters than Capua. Marcus Marcellus, accordingly, who had drawn up his troops near Nola, upbraided the enemy, with a view to raise the courage of his own troops, by saying that Capua was Hannibal's Cannæ, for that there he had lost his warlike valor, there his military discipline, there the renown of his past and of his future, too. Marcellus then engaged the enemy in battle and routed him.

And just as Capua was fatal to the army of Hannibal, so Babylon was to the soldiers of Alexander, and quite corrupted their military discipline, so much so that if Alexander had only had an enemy, his loss of strength for future conflicts would beyond doubt have been disclosed (so wrote Quintus Curtius). Bk. 5.

[4] And, to be brief, we can not have a better instance of what the neglect or maintenance of military discipline means, than that of the Romans; for they who aforetime were superior to all people in their instinct for justice and their military glory, later on, when discipline decayed, were conquered by every one. And so Cato (in Sallust) says:

"Do not suppose that our ancestors, from so small a commencement, raised the republic to greatness merely by force of arms. If such had been the case, we should enjoy it in a most excellent condition; for of allies and citizens, as well as arms and horses, we have a much greater abundance than they had. No, there were other things which made them great, which among us have no existence—such as industry at home, equitable government abroad, and minds impartial in council, unswayed by any improper or corrupt motive. Instead of such virtues we have luxury and avarice; public distress and private superfluity; we extol wealth and yield to indolence; no distinction is made between good men and bad; and ambition usurps the honors due to virtue."

And when Fabricius was sent as envoy to Pyrrhus, and heard at his court one Cyneas of Thessaly telling how some Athenian, of repute for wisdom, maintained that pleasure was the sole motive of human action, he shrewdly took the speech as an augury and prayed that this wisdom might straightway descend on his enemy Pyrrhus and on the Samnites. Val. Max., bk. 4, ch. 2.
It was politic, too, of the Spartan State to withdraw for so long the eyes of its citizens from looking to Asia, for it recognized that thence flowed all seductions and certain most baneful poisons, both of body and of mind, and that more was lost by such victories than was gained in war. Val. Max., bk. 2, ch. 6.

[5] Hence, too, our forebears reckoned women camp-followers a great disgrace and matter of severest reproach and a soldier was not allowed to have his wife or family with him save by permission of the
Cod. 12, 35, 10. prince, and a soldier might not even marry a wife when in a province. Cod. 5, 4, 6, and Dig. 23, 2, 65.
And a proconsul was liable for the delicts of the wife whom he had
Dig. 1, 16, 4, 2. taken with him into his province; and, indeed, Ulpian says that it is Dig. 1, 16, 4, 2.
better for a proconsul to go to his province without his wife. This was
Annals, bk. 3. the opinion, too, of Severus Cæcina (in Tacitus), for he said it was a characteristic of the companionship of women to hinder peace with luxury and war with fear and to turn the marching column of the Romans into the likeness of a barbarian raid. Formerly, too, a constitution of Constantine forbade unions between low women and certain soldiers, but the emperor Justinian amended this and allowed soldiers to marry
Nov. 117, c. 6. Cod. 5, 4, 21. what wives they pleased so long as they were free-born women.

[6] The task of keeping down the amount of baggage is also a matter intimately connected with military discipline, for this often is a very serious hindrance on a march. And so when Philip of Macedon first enrolled an army he forbade the employment of vehicles and would not allow his cavalry more than one servant each and his infantry only one servant among ten to carry mills and ropes. Scipio forbade the keeping of pillows and was himself the first to use a hay pillow and he would not let his men ride on asses or mules when on the march, saying that very little was to be expected in war from him who could not go on
Appian, Span. war. his own feet.

[7] Caius Marius, in order to reduce the amount of baggage, had the dishes and eating vessels of his men fitted into bundles and placed on prongs, under which the burden of them was more manageable and easy —hence the popular saying, "mules of Marius." And the same thing
Reg., bk. 1, tit. 22, par. 2. was also provided by the constitutions of the Kingdom of Spain.

Tuscul., quest., bk. 2. [8] And this is what Cicero had in mind when he said: "You may see whence the very name of our army, i. e., *exercitus,* is derived: Great is the labor of an army on the march. Then consider that they carry more than a fortnight's provision and whatever else they may want, including the burden of the stakes; for as to shield, sword, or helmet, they look on them as no more incumbrance than their own limbs, for they say arms are the limbs of a soldier, which they carry (says he) so commodiously that when there is occasion they throw down their burdens and use their arms to fight with as readily as if they were limbs."

Alexander, indeed, when his force was so burdened with booty and the apparatus of luxury that it could scarcely move, had the stuff collected, all except absolute necessaries, and put a torch under his own to begin with and then ordered the rest to be burned, so that the mischance
Quint. Curt., bk. 6. should fall on the stuff rather than on discipline.

[9] Further, as to military discipline, it was provided by a military law that camp-followers should not wander about indiscriminately among the cavalry, and that no soldier should sell the corn supplied to him at the public expense or exchange his booty of cattle or slaves for wine, and that no private soldier should have a slave or beast of burden in the battle-array or camp, and that no one should afterwards be captain where he had been military tribune, nor one who had been captain afterwards become private. And so Livy tells how one Volero, a ple- Bk. 2.
beian, who in earlier expeditions had been a captain, was enrolled among the privates and refused his military duties, alleging that he ought not to be made a private where he had been a captain, as he had not incurred any ignominy during his service. A soldier, too, who failed to demand Dion. Halic., bk. 9.
his rations within proper limits of time had them withdrawn. Cod. 12, 37, 6.

Cato, too, urged that soldiers should be instructed to be fierce towards enemies, but humane towards fellow-citizens and allies, slow to inflict an injury, but prompt to avenge one, and desirous of nothing more than winning praise and glory. And in olden time it used to be sedulously inculcated that soldiers should deem their first bond to be the obligation of their oath; and the second the love of each other in, as it were, an inexplicable union; and the third the iniquity of desertion.

[10] Lucius Æmilius Paulus used to say that there should be one commander in an army to consider and devise what measures should be adopted, at times by himself and at times with those whom he has summoned to his councils, not discussing his plans either openly or secretly with those who have not been summoned, and that the private soldier has in charge three things, to keep his body as strong and active as possible, his weapons in condition, his food ready for sudden orders; and for the rest to know that the care of himself belongs to the immortal gods and his general; and that an army was not in a healthy condition Livy, bk. 44.
if its consul and commander were affected by rumors of the mob. For (as Tacitus says) soldiers ought to be ignorant of some matters and to know about other matters. The rigor of discipline varies with the authority of commanders, so that there are many orders which it is expedient should only be given through centurions and tribunes.

It is rather by the obedient attitude than by the putting forth of officers' orders that a military situation is kept in healthy condition; and that army will be bravest in time of crisis which is the quietest before the crisis. And so Cæsar rebuked the rash eagerness of his troops before Avaricum, for they determined for themselves where to go and what to do, and did not halt at the signal for withdrawal, and could not be kept in hand by the military tribunes and legates; and, much as he admired their high spirit, which neither fortified camps nor high mountains nor walled towns could check, yet, said Cæsar, he must equally blame their license and arrogance in thinking that the planning of victory and of

developments was their business rather than the business of their generals, and that he wished for modesty and self-restraint in his troops not less than for valor and high spirit.

Caes., Gallic war, bk. 7.

[11] Again, there is preserved in Flavius Vopiscus a letter from Aurelianus Cæsar to some tribune, in which military discipline is briefly touched on, as follows:

"If you want to be tribune, nay, if you want to live, control the hands of your men. Let none steal another man's chicken or seize his sheep or carry off his grapes or requisition oil or salt or wood, but let him be content with his rations; let him make for the booty of the enemy and not the tears of the provincials; let his armor be clean, his tools in repair, his sandals stout, his clothing new; let him put off his old clothing; let him spend his pay on a sword-belt, and not in a cook-shop; let him wear armlet and ring; let him groom his horse and clean his own stall, and not sell the animal; let him readily attend to the company's mule; one soldier should humor another as if he were his slave; a soldier is entitled to free medical aid; soldiers should give nothing to soothsayers; should live chastely in their quarters; and the one who goes to law should get a flogging." So he.

Furthermore, for the better keeping of soldiers in their duty, governors of provinces through which troops pass have instructions to have all supplies ready for them, without giving cause of complaint to the provincials, and whatever expenses are incurred in so doing are reckoned part of any tribute-money that may be owing to the emperor. Soldiers, too, are bidden to be content with such food as is found in the different localities, and they can not claim any different food. This is also laid down in the constitutions of Gaul.

Nov. 130, col. 10.

Chapter II.

Of the duties of legate and tribune and other officers.

[1] Who were in olden times the principal military officials among the Romans is clearly shown by the following words of the dictator Papyrius, as reported by Livy: Livy, bk. 8.

"So that the soldier would not obey the commands of the centurion, nor the centurion the tribune's, nor the tribune the legate's, nor the legate the consul's, nor the master of the horse the dictator's: and the orders of generals-in-chief would be disregarded." Now we have already spoken of the office and power of a general or commander of an army.

[2] Legates were persons accompanying an expedition and helping in its affairs, who were appointed to consuls and generals in order to act as their deputies and carry their plans into execution. They were also in a position to give the most trustworthy testimony of any cases of good counsel or of any acts of bravery or of deserving valor or of cowardice, and also of the degree of care and good-faith and diligence and military discipline with which the commanders governed the army and camp; and whether their reports contained anything false or ill-founded, or not the whole truth. And the authority of legates was such, alike as regards the administration of a province and the management of an army and the drawing up of a battle-line, that if the consuls or the general were absent or prevented, they exercised sovereign power. Alex. ab Alex., Genial. dies, bk. 6, ch. 3.

Civil war, bk. 3. [3] Furthermore, it is clear that (as Cæsar says) the functions of a legate are different from those of a general. The former has in everything to carry out orders, while the latter has free discretion in the measures he takes for the good of the State. And so Cæsar said that the policy of Sylla, whom on his departure he had put into command of the camp, did not seem to have been a faulty one, namely, to recall his men when they pursued Pompey's troops too far, although it was a common belief that, if a keener attack had been assented to, the war could have

been ended on that day. For when Sylla was left by Cæsar in charge of the camp merely, he set his men free and was contented therewith and declined to take part in the engagement. For the same reason Quintus Titurius Sabinus, Cæsar's legate in the Gallic war, kept within the camp, although the enemy were already up to the trenches of the camp, for he thought that a legate ought not to fight with so numerous an enemy, especially in the absence of the supreme commander, unless on equal ground or because some favorable opportunity had arisen.

Caes., Gallic war, bk. 3.

Further, just as the Romans were extremely lenient with their generals (to whom they granted full discretion to provide for the State's highest interests) when they had sustained a reverse, as has been said elsewhere, so did they prove harsh in the punishment of legates, tribunes, and other subordinate officers in a case of contempt or disregard of the supreme authority.

[4] For in military matters it has always been reckoned a very grave fault, worthy of a capital accusation, for one to exceed the limits of his commission, even though he meet with success. It was especially on this ground and because of its accordance with old usage that the contention of the dictator Papyrius prevailed, when he demanded that his master of the horse, Quintus Fabius, should be given up to punishment for having led out the army contrary to his commands, although he had returned to camp victor over the Samnites. The Roman people, however, and the tribunes of the plebs interposed on behalf of Fabius, and after a time, overmastered by a speech of Papyrius, they turned to prayers and entreaties that the dictator should remit to them the punishment of the master of the horse; so he yielded; but he called them to witness that Quintus Fabius was not acquitted thereby of the guilt of fighting contrary to the orders of his commander, but that, after having been condemned as guilty, he was granted as a boon to the Roman people, and to the college of the tribunes which supported him with its prayers and not with the regular powers of its office. As to himself (said he) it was enough to have vindicated military discipline and sovereign authority, which had been placed in jeopardy.

Dig. 49, 16, 3, 15.

Livy, bk. 8.

[5] There are, however, some who think that the terms of a commission may be departed from if, owing to change of circumstances, an opportunity arises of successful action—as, for instance, some chance occurrence promises a successful result and an almost certain victory—for fear of losing an opportunity of success which has been offered by the gods. This is, however, a thorny question, especially when reckoning has to be made with some hard and inexorable Papyrius or Manlius or Postumius, who holds that the whole office of a general is destroyed and dissolved if any one receives a command without due respect, or even with circumspect advice. For the limits of a commission must be jealously observed and nothing be done inconsistent with it, even if the

By inference in Dig. 17, 1, 30. Felinus, generally, on c. 1, X, 1, 2 (col. 14), and c. 3, X, 1, 33 (col. 3), Cremen. Sing. 150, and Rochus Curt. on c. 1, X, 1, 2 (col. 2).

probable result thereof would be the greater advantage and profit of the author of the commission. And this is a question which has been variously treated, even by philosophers. Beyond doubt the severity of Papyrius deterred others from successful action, although they had the opportunity; and the example of Quintus Fabius (says Livy) was so much before the eyes of the legate, Marcus Valerius, who commanded the camp in the absence of Papyrius, that he did not fear the forces of the enemy more than the grim anger of the dictator. And so when the commissariat was ambushed in difficult ground with heavy loss, the common belief is that the legate could have relieved it if he had not been in such dread of the stern edicts.

Dig. 17, 1, 5.
Gellius, Noctes Atticæ, bk. 1, ch. 13.
Bk. 8.

[6, 7] Further, the governance of an army does not consist alone in keeping discipline (as Marcian said), but also in observing it; and he who commands soldiers ought to grant them furlough as sparingly as possible, so much so that a soldier ought not to be sent to fish or hunt, and this was so laid down in the discipline of Augustus. In fact, for the greatest security, the tribune can not allow furlough to more than thirty men; if he allows it to more, their pay is to be passed on to the treasury, and the tribune who has allowed it must make the pay good to the men, in addition to the penalty of losing his girdle. But in a time of active service, or when an attack of the enemy is threatened, no one at all should be away from the standards and it will be a capital offense to allow furlough; and absence from the standards is so much disfavored that a soldier while on furlough is not taken as being absent on State business.

Dig. 49, 16, 12, and Cod. 12, 35, 13.
Cod. 12, 37: 10, and 16 (2 and 3).
Cod. 12, 42, 1.
Dig. 49, 16, 1.

[8] Further, the commander of the army can not, at his mere pleasure, move a man from one rank to another, except the emperor give consent on grounds of utility to the State; for, as the emperor says, none should attain increase of honor by canvassing, but only by labor, and none should be promoted to dignity by voting, but by labor and according to due gradation of ranks; and that man ought to be in front of others who is put there by longer service or by labor. And so the consul Quintus Metellus, although prevented by no law from having his son as perpetual pupil-attendant (*contubernalis*), preferred, nevertheless, that he should earn the position in due course. And Theogenes the Athenian is reported to have employed an ingenious stratagem, while leading his army to Megara. Some soldiers besought promotion, and he replied that he would grant it to them then and there; and then he moved his cavalry to the front and bade them face about and, feigning to be the enemy, make an attack on their comrades; and when this was done he allowed the ranks of those whom he had in readiness as if for an attack of the enemy to be so arranged that each man held the position in which he wished to be and, as all the slackest had stepped back and all the keenest had jumped forward, he promoted each man in military rank just according to the place in which he found him standing.

Cod. 12, 35, 14.
Cod. 1, 31: 1 and 2.
Cod. 1, 27, 2.

It was, also, ordained of old that no one could be admitted to the tribuneship who had not previously commanded a wing, nor command a wing unless he had been in charge of a cohort; and it was ancient usage that when in camp a private should go and salute his centurion every morning and await orders, and similarly a centurion the tribune. But Hadrianus Cæsar promoted to the tribuneship men of ripe years and great sagacity, who had been taught by age and experience. And he issued an edict forbidding the appointment of a beardless young man to that office; and Alexander of Macedon put such a value on his tribunes and centurions that he would allow no one under sixty years to command the ranks. It is clear, however, that at times, in days gone by, these dignities were conferred on the unworthy and even on boys under puberty. (Dig. 27, 1, 8, and Cod. 6, 21, 18.)

It was also enacted by a military law that none should subsequently be made a captain where he had been tribune, for the centurion, decurion, and commander of the ranks were inferior to the tribune; but this rule, so Livy says (Bk. 7.), was not made in favor of tribunes, but it was enacted by a military *lex sacrata* (i. e.,law devoting to the infernal gods one who violated it) on the demand of some confederate soldiers adversely to Publius Salonius, who was military tribune and chief centurion in almost alternate years. But military tribunes may have centurions and decurions under them, subject, however, to the authority of the legate.

[9] Further, it is usual for military tribunes, when in command of camps and legions, to exercise authority over the troops, and the lictors carried vine-staves before them to deter the insolent, and not rods as in the case of a consul or prætor. For the Romans used to beat contumacious soldiers, not with rods, but with vine-staves; but if they were foreigners, with cudgels, and this punishment was not infaming in character, as was that inflicted by a lictor. (Plin., bk. 14, ch. 1.) It must, however, be observed that tribunes could not punish a Roman citizen capitally, nor any other soldier, as we shall remark elsewhere. (Below, chap. on military courts.) It was, too, an early usage for the head of the State, when raising any one to the tribuneship, to give a sword into his hand, signifying thereby that he was to have authority over the soldiers according to military law.

[10] Now it was the especial function of a tribune to supervise the camp and army and see that it was properly entrenched and patrolled; to order ever-watchful sentinels, so that the enemy could not effect anything by stealth; to have the troops who were in camp listening for a word and intent for a command; to lead them to exercises, to appoint their stations, to collect the keys of the gates, to visit the watch, to attend to the provisioning of the troops, to sample the provisions, to repress the frauds of the corn-measurers, to listen to the complaints of the men, to chastise their offenses within the limits of his authority, to inspect the invalided, to take charge of the wounded, and above all to administer to the soldiers the solemn oath. (Dig. 49, 16, 12, 2.)

Further, it was from the tribunes that the troops received the watchword—whether they were proceeding to march against the enemy or to lay out a camp or to take their position in the front line of battle or in the reserve line, or to go on outpost duty or on watch. And the tribunes received instructions from the general about the appropriate signal. It was also the peculiar function of the tribunes, in the heat of battle, to cheer and admonish the men, individually and collectively, and to take note of their conduct in attack. And it was theirs to grant a discharge to soldiers who had performed the military service that was required of them, on good cause shown and upon the authority and subject to the orders of the consuls—it not being competent for the tribunes to do this on their own authority. And so the censor Quintus Fulvius Flaccus removed his brother Fulvius from the Senate for having discharged Val. Max., bk. 2, ch. 7. a cohort belonging to the legion of which he was tribune, without the Livy, bk. 31. orders of the consul.

And, lastly, it was in olden days an especial duty of generals and tribunes and centurions, when in summer-camp, to make the recruits who had recently joined march up and down and over and over again in squads, and shout and take up positions and submit to authority and obey the word of command and form in close order, or make a wedge or a phalanx, and follow the standard and accustom themselves to endure weariness and heat and vigils. And all this in order that they might not encounter the enemy without plan or governance, or be beaten and retreat, and that every one might know his place in the ranks, in such sort that by daily use their instincts would tell them what was to be done and what left undone, without any outside impulse or command. And this special drilling is attributed to Iphicrates, who by that means taught the troops so to take up their position in battle-line, without the general's intervention, as to display the most scientific disposition.

[11] Further, if a tribune or centurion or any other person makes a false return of the numbers of the troops and intercepts the extra pay he is condemned in fourfold and degraded; but by the constitutions of Gaul Cod. 1, 27, 2, 8. he is punished capitally. He also who takes money in connection with the draft or discharge of a soldier is liable under the *Lex Julia repetundarum* (i. e., on extortion) and is, accordingly, usually punished by exile Dig. 48, 11, 6, 2. or worse, and anything given to obtain exemption from levy as a recruit Dig. 48, 11, 7, 3. can be reclaimed as if given on immoral consideration. Cod. 4, 7, 3.

Further, any one who, during a passage of troops, receives anything from towns or estates, by bringing improper pressure to bear, is liable in double; but one who has plundered a province is usually recalled for Nov. 130, col. 10. so doing and ordered to make fourfold restitution. Dig. 48, 11, 1.

Chapter III.

Of quartermasters (metatores, mensores).

[1] The name *metatores, mensores*, i. e., quartermasters, is given not only to those who select the place for pitching a camp or pavilions or tents (a topic well dealt with by Polybius), but also to those who go in advance of troops who have to be quartered in towns and indicate the houses, fixing marks on them and giving the names of those for whom quarters have to be found in each house; and any one who dares to destroy these marks is liable to condemnation for falsification.

On Roman Camps, and Vegetius, bk. 2, ch. 7.

Cod. 12, 40, 1.

[2] Further, in accordance with a rescript of the emperors Arcadius and Honorius, a house was divided into three parts and a third part was allotted to the troops—in such sort that the owner had the right of first choice, the guest the second, and the third part was left again for the owner. Any compartments used for sale of merchandise are ordinarily exempt from this division, unless there does not happen to be enough room for the troops in their third of the house. Men of illustrious rank, however, ordinarily have half a house, not a third, assigned to them—on the terms that the one chooses and the other makes the division. Antigonus, however, decreed that none under fifty years of age should be quartered on a *materfamilias* (matron); and when he heard that his son had gone off into the house of one who had three very good-looking daughters, he said, " I hear, my son, that you have very crowded quarters in a house where there are several owners; take more roomy quarters." And he bade him make the change. Further, a soldier whose home is in that town can not demand that other quarters shall also be assigned him.

Cod. 12, 40, 2.

Cod. 12, 40, 2.

Cod. 12, 40, 9.

[3] Certain persons are free from the annoyance of having to provide quarters: the physicians of the sacred palace, to wit, professors of the liberal arts in the City of Rome, and painters of free birth; men of consular or patrician rank, consuls, the heirs of these persons, and others of preëminent dignity. This important immunity was granted them by a constitution of the Emperor Arcadius: and the Emperor Claudius, by a decree of the Senate, forbade privates to enter the houses of senators, even for the purpose of paying their respects.

Cod. 12, 40, 8.

Cod. 12, 40, 10.

Suetonius, Life of Claudius.

[4] Men of low estate, too, ought not to be compelled to supply quarters to soldiers; and in towns quarters only can be demanded for the troops, so that they can not claim from their host anything necessary for themselves or the keep of their animals, nor indeed can they receive such things even from willing hosts.

Dig. 1, 18, 6, 5.

Cod. 12, 40, 5; and 12, 41; and 12, 37, 3.

[5] Quartermasters who have extorted money by improper means from those supplying quarters must restore it twofold and are punished by exile and, according to the constitutions of Gaul, capitally.

Nov. 130, col. 10.

Chapter IV.

Of soldiers and who can serve as such.

1. Soldiering is not sinful.
2. A soldier may lawfully kill an enemy.
3. Who are called soldiers.
4. Clerics not to be enrolled as soldiers.
5. Nor agriculturists.
6. Nor slaves.
7. Nor those capitally accused.
8. Nor heretics.
9. Nor those branded with *infamia.*
10. Nor crippled persons.
11. Soldiers forbidden to engage in agriculture.
12. No one can have two military positions of differing kinds.
13. A soldier may not be a *procurator* (agent).
14. Of the age for soldiering.
15. Veterans may be levied.
16. Natives rather than foreigners to be employed as soldiers.
17. The Romans for a long time served at their own costs.
18. The amount of a Roman soldier's pay.

[1] To take part in a just war is no wrong, as we have elsewhere
c. 5, C. 23, qu. 1. shown; but to do so for the sake of booty is a sin. And so, when John, a
man most acceptable to God, was asked by the soldiers, who were anxious about salvation, what they should do, he did not forbid them to
serve as soldiers, but said, " Do violence to no man, neither accuse any
Luke, ch. 3. And c. 2, C. 23, qu. 1, last para. falsely, and be content with your wages."

[2] Accordingly, both the canon and the civil laws allow a soldier
c. 13, and c. 41, C. 23, qu. 5. to kill an enemy in war; nay, if he abstains from doing so, he is guilty of
And Dig. 48, 8, 3, and 49, 16, 7. desertion and contempt of sovereign authority. c. 13, C. 23, qu. 5.

[3] Now those only are called soldiers (*milites*) who have had
the oath put to them and have taken it and have been incorporated in
the ranks. Sailors and oarsmen in the navy are " soldiers." Dig. 37, 13, 1.

[4] Further, not every one is admissible as a soldier and some
persons are not compelled to become soldiers; for clerics, first of all, are
exempt from military service, a concession made in olden days, as part
of a general immunity, by the Gauls to their Druids, who had charge
Caes., Gallic war, ch. 6. of religious matters. The priests also, on Romulus' foundation, were
Dion. Halic., Rom. antiq., bk. 2. free from all warlike duties; to this law an addition was made, after the
capture of the city by the Gauls, that priests should have this immunity
Appian, Civil war, bk. 2. except in the event of a Gallic war. Cicero, however, tells us that in the Philipp. 5 and 8.
Plutarch, Life of Marcellus. Gallic war the usual exemptions prevailed, but not at the time of the
Gallic and Italian revolt—from which he infers that revolt is a graver
thing than war. But clerics are forbidden to serve as soldiers: and of
c. 3, C. 23, qu. 8. them and of himself Ambrose said: " Let not the soldiers of Christ
And c. 3, Dist. 36. And c. 1, and c. 27, look to iron missiles and armour; but grief, weeping, tears, and en-
and c. 28, C. 23, qu. 8. treaties were my weapons against the enemy." For no man that warreth

for God entangleth himself in the affairs of this life (as the Apostle says); and if a cleric should take service as a soldier he will be unfrocked. But one in lesser orders who fights in a just war—unless he kills or wounds—is not irregular. To Timothy. c. 5 [and c. statim] C. 23, qu. 8. c. 24, X, 5, 12, and gloss on c. 47, C. 7, qu. 1.

[5] Agriculturists, also, are not admissible as soldiers, even when they willingly offer themselves, nor can they be compelled to serve if unwilling; for it is not less important to the State to have men to till its soil than to have men to fight its battles. Hence it has been decreed that agriculturists who have enlisted as soldiers can be reclaimed into their former condition; for the dirt of the fields does not go well with the honor of soldiering. Cod. 12, 33, 3; and 11, 48, 18 Cod. 11, 48, 7. Cod. 11, 63, 4. Cod. 12, 5, 2.

[6] Wherefore also Marcianus ruled that slaves ought to be kept off all military service: otherwise they may be punished capitally. But a distinction must be drawn, in accordance with a rescript of Trajan, according as they have offered themselves voluntarily or have been levied or have even been given as substitutes; for if they have been levied, it is the official (*inquisitor*) who is in fault; if they have been given as substitutes, it is the fault of those who have given them; if they came of their own accord with full knowledge of their status, the fault must be visited on them. Indeed if it be with the cognizance of their owner that slaves have succeeded in enrolling themselves as soldiers, he will be deprived both of his ownership and of the rights of patronage (*jura patronatus*). Dig. 49, 16, 11. Plin., Epist., bk. 10 Cod. 12, 33, 7.

Furthermore, after the defeat at Cannæ the dictator Marcus Junius and Tiberius Sempronius, his master of the horse, made a novel levy and, under the pressure of necessity, bought at public cost eight thousand strong youths out of slavery and armed them—having first questioned them one by one whether they were willing to serve as soldiers (whence they were called *volones*, volunteers)—and subsequently, by dint of discipline and authority, they turned them out first-rate soldiers. And when the same Tiberius Sempronius was appointed consul, he issued instructions to the legates and tribunes that no reproaches based on the former status of any soldier should sow discord in the ranks; that the veteran should allow himself and the recruit to be treated on the same footing, and the same as between the freeman and the "volo"; and that all should esteem those to be sufficiently honorable and well-born to whom the Roman people had intrusted its arms and ensigns; for the same stress of fortune which makes it necessary to adopt any given measures, makes it necessary to support them when adopted. Livy, bk. 22. Livy, bk. 23.

Again, not only slaves, but those also about whose status there is a dispute, are prohibited during that time to assume the title of soldier, even though they may be in reality free. So also free-born persons who are in good faith detained in slavery (*qui bona fide serviunt*), and ransomed prisoners before paying off their ransom-price, may not be

Dig. 49, 16, 8. received as soldiers. We read, further, how in days gone by the Roman people took great heed that there should be no need for generals to administer the oath of service to the lowest class of citizen (*capite censos*), whose excessive poverty laid them open to suspicion, and so public arms were not intrusted to this class; and Caius Marius was the first to break this usage, confirmed as it was by long continuance, and to
Val. Max., bk. 2, ch. 3. admit one of this class as a soldier.

[7] Further, those liable to a capital charge who voluntarily enlist
Dig. 49, 16, 4, 5. are capitally punished; similarly with those who have been given to beasts or deported to an island, and who enlist or conceal the facts when
Dig. 49, 16, 4: 1 and 2. levied. But if one enlists who has been deported for a time only, and that time has now elapsed, the nature of his condemnation must be inquired into (so Arrius Menander ruled), so that if it involves perpetual infamy he may be discharged from his military oath; otherwise he is
Dig. 49, 16, 4, 4. not prohibited from enlisting and seeking the honors of military service. He again who has compounded the adultery of his wife is ordered to be
Dig. 48, 5, 12. discharged from his oath and deported. Yet, nevertheless, after the defeat of Cannæ, the dictator Marcus Junius, inasmuch as there was a dearth of soldiers of the proper class of citizen, decreed that if any of those who had ventured on capital crime or who were in chains as judgment-debtors would serve under him as soldiers he would order
Livy, bk. 23. their release from their liability or their debt.

Cod. 1, 5, 8. [8, 9] Furthermore, heretics are forbidden to enlist and all who
Dig. 3, 2, 2, 3. are suffering under *infamia*. Therefore those affected with ignominy
Dig. 49, 16, 6. are not to be admitted as soldiers. Also, no one can assume the quality
Cod. 12, 33, 2. of armed soldier in order to evade the obligation to hold civil office; and he who has sought a soldier's position in order to escape a lawsuit
Cod. 12, 33, 1. Dig. 49, 16, 4, 8. should be discharged from his oath on the application of his opponent. So also one who has enlisted through fear of a criminal charge, with
Dig. 49, 16, 16. which he is threatened, must promptly be discharged from his oath. No
Cod. 12, 43, 1. vagrant and no veteran soldier ought to be admitted as a recruit. He, too, must be judged unworthy of a soldier's position who has brought
Dig. 37, 15, 3. a criminal charge against his parents who reared him.

[10] Further, those so crippled as to be unfit for military service
Dig. 49, 16, 4, 12. are not to be received as soldiers—not to be included in this list is the man born with only one testicle or who has lost one, for he may lawfully enlist, according to the rescript of Trajan. The generals Sylla and
Dig. 49, 16, 4, pr. Cotta are remembered to have been naturally of that build: and we read also that the eunuch Narses was appointed by Justinian to the command of his army, and it was he who put an end to the war with the Ostrogoths in Italy; and a man with only one testicle is not either diseased or
Dig. 21, 1, 6, 2. blemished, seeing that he can procreate. And Cyrus had eunuchs as his
Xenophon, Cyropædia 7. bodyguards, thinking that they would show more devotion to duty and be a more reliable protection as being beyond the temptations of lust.

[11] Again, soldiers are forbidden to carry on agriculture or trading or any other business lest their proficiency in arms should suffer by
their attention to other occupations. For, as Plato laid down in the Cod. 12, 37. Dig. 49, 16, 12, 1.
Republic, it is fitting for different individuals to practice different arts. Cod. 12, 35, 13; and 31, end.
Wherefore, too, a soldier may not purchase land in a province lest his
attention to agriculture should lead to neglect of his military duties. Cod. 12, 35, 31.

[12, 13] Hence, too, no one may have two military positions of
different kinds at the same time, or a civil office and a military position. Cod. 12, 33, 5.
And for the same reason a soldier may not be an agent, not even for his father or mother or wife, but only in his own interests (*procurator in
rem suam*). And a soldier can not sue in respect of property which he Cod. 2, 12: 7 and 9.
asserts to have been given to him, when the gift has been made with
intent to alter the parties to a suit (*judicii mutandi causa*); but it is the Dig. 4, 7, 11.
former owner who must bring the action, lest it seem that a lawsuit
rather than a bit of property has been made over to the soldier. Lastly, Cod. 2, 13, 2.
a soldier is forbidden to act as accuser, except in cases of treason and of Dig. 48, 2, 8. Dig. 48, 4, 7
outrage on himself or his family. And Justinian enacted that those who Cod. 9, 1, 8. Nov. 116.
involved soldiers in private business and withdrew them from the State's business were to be punished by having their property sold up.

[14] It now remains to say something about the age for soldiering. It is known that the Romans would hardly ever have any one enlisted as a recruit who was less than seventeen or more than forty-six years old, and this dates from the ancient census-arrangements of Servius Tullius and was subsequently secured by a *lex sacrata* under Caius
Gracchus. At the time, however, when the Romans were sore pressed Plutarch, Life of Gracchus.
in their war against Veii, a levy was made, and not only were younger
persons enlisted (Livy tells us), but older persons also were compelled Bks. 5 and 6.
to give in their names to do service as city-guards. This was by the orders of Camillus.

On another occasion, after the defeat at Cannæ, the dictator Decius* Junius enrolled persons of less than seventeen years, nay mere boys, and those over sixteen who did not take part in that war were officially cen-
sured. But Phocion, with intent to lessen the ardor for war of the over- Livy, bk. 22.
bellicose Athenians, by means of a rigid levy, not only summoned the young men but compelled even octogenarians who had served their term to give in their names. There is extant, however, a constitution of the
Emperor Frederick dealing with the judicial combat, which says that one Feud. Law: ii. 47.
over sixty or under twenty-five is not bound to fight in person. Sacred his-
tory also tells us that the Lord ordered Moses to enroll all Israelites Numb. 1.
over twenty years of age, and this was the age which Plato thought the fittest for military service. With this in view, the precept is wise that if you have no veterans you must seek young recruits.

* Thus in original, but should be Marcus. See page 186.

[15] Now a small band of trained veterans is far more valuable than untaught and inexperienced numbers who, when confronted by slaughter, are terrified by every trifle and think more about escape than about glory. And so Alexander, after the death of Philip, his father, overcame divers and countless hostile forces by means of the forty thousand veterans, well-trained and thoroughly experienced in the business of war, whom his father had left to him, and he reduced very many provinces of the world; and when the same man was about to lead his seasoned veterans against Darius, he exercised great care in his choice of recruits and thereby overthrew and put to flight a vast horde of Persians with his small band.

Veget., de re milit., bk. 1, ch. 1.

It was the ancient practice, too, to judge by a man's habit of body whether he was fit for military service, with deep chest and erect carriage, whether he was brave and undaunted and what his appearance and vigor and bodily strength would be, so that the service of the State might employ such as were brave and faithful. And so Cato held that a fat soldier was of no use to the State, for everything between his gullet and his groin would be in the service of his belly.

[16] And sovereigns should be urged to employ as soldiers in war natives rather than foreigners, for the latter serve for pay rather than glory. This was the example set by Tullus Hostilius; for he had determined on war at a time when the Romans had had forty years of peace and leisure and exemption from war, and he scorned foreign auxiliaries, and summoned his own men only to war, and in a short time he turned them out first-rate soldiers by dint of discipline. For native guards are far the safest, and one's own arms are far more suitable than another's. Sacred history is taken to have shown this to us, for when David offered himself in single combat with Goliath the Philistine, and Saul, to increase his courage, would have put his own armor on him, David would not have it, on the ground that it would hamper him, but attacked with his own weapons only, namely, a sling and a staff, and laid his enemy low. Indeed, if a general desires, or is driven by necessity, to employ foreign auxiliaries at all, he must give especial heed not to place such confidence in them as that he has in his camp a smaller amount of native force and strength, lest there deservedly befall him what befell Cnæus Scipio in his war in Spain against Hasdrubal. For Hasdrubal noticed what a small force of Romans was in Cnæus Scipio's camp and how he was placing all his hope in the Celtiberi, and so he had secret interviews with the chieftains of the Celtiberi and bargained with them that, for a great reward, they would call off their forces and withdraw from the war, for there was no fear that the Romans would detain them, seeing that the Romans were so few in number. And Livy urges Roman generals to keep this example before them as a warning. Now, because the Emperor

1 Sam., ch. 15.

Bk. 25.

at Constantinople had no forces of his own, he summoned Turkish auxiliaries to protect him from his neighbors; but he could not get rid of them at the end of the war; and that is how the whole of Greece fell under the rule of Turkey.

I, therefore, do not approve of the policy of Cyrus, who declared that soldiers should not be selected out of citizens, but be brought from afar like the best horses, nor of that ancient custom of the Alexandrians, who would not allow of any but foreign soldiers. Much sounder was the Roman policy; for, in order to have an ample supply of native soldiers, they stipulated in their treaty with Antiochus that he should not hire soldiers or receive volunteers out of Roman dominions. And in the war with Pyrrhus, although the Romans had suffered two defeats, they nevertheless returned the auxiliaries who had been sent by the Carthaginians.

Livy, bk. 38. Appian, Syrian war.

Justin, bk. 18.

[17] Further, it is worthy of remark that the soldiers of Roman stock, right away from the foundation of their city for nearly three hundred and fifty years, served at their own cost and expense. For, during one part of the year they served in camp and during the other part they made provision for their children and wives and household gods and themselves and their household by agriculture and country tasks. But at the time when a declaration of war against Veii was under discussion, which war would involve a long and difficult siege and would have to be carried on throughout the winter, the Romans, taught by expediency and necessity, provided by a decree of the Senate for the payment of the soldiers out of funds publicly collected, although up to that time every one had performed his military duties at his own expense. Further, after the defeat at Cannæ there was such a determination to help the treasury-deficit that no knight and no centurion would take pay, and they employed the word "mercenaries" as a term of abuse for those who would take pay.

Livy, bk. 4.

Livy, bk. 24.

[18] Now Tacitus indicates that the pay of the Roman soldier was ten asses a day, when he says that during the Pannonian revolt the soldiers complained, among other things, that their bodies and souls were reckoned at ten asses a day each, and that for this sum they had to find dress, arms, and tents, and put up with the severity of the centurions and the absence of gifts; and so they claimed pay at the rate of a denarius each. It is clear from this that, although the denarius was originally reckoned at ten asses (and so bore the mint-stamp X), yet in course of time the value of the denarius was increased. And so, during the dictatorship of Quintus Fabius Maximus, when Hannibal was bearing hard on the State, Pliny writes that the exchange-value of the denarius was sixteen asses; yet he asserts that for the purposes of a soldier's pay a denarius was always given for ten asses. But the prætorian cohorts received two denarii each. If, however, we compare this denarius with the

Annals, from death of Aug., bk. 1.

Bk. 33, ch. 3.

Tac. Annals, bk. 1.

De veter. col. num., ch. 2. Hernan. in Nomencl. rei num. money of our day in weight and value, Covarruvias clearly proves that it was almost equal to the Spanish real, after Endæus and others; so that the pay of our soldiers is not at all or very little different from that Alc. on Tac. of the Roman soldier.

But what the amount of the pay of Roman cavalry was, is not quite clear, except for the fact that public horses were assigned to them and that in the division of booty they sometimes had three times, and sometimes twice, as much as the infantry. And so, out of the booty taken by Lucius Æmilius Paulus, after the defeat of Perseus, each foot-soldier Bk. 55. (Livy tells us) got a hundred, each centurion twice as much, each horse-soldier three times—on which some found a conjecture as to the pay of a Bk. 55. horse-soldier. But in another place the same writer tells us that there was so much booty from the Epirote cities, which had defected to Perseus, that four hundred denarii apiece were divided among the horse-soldiers and two hundred apiece among the foot-soldiers. And so I dare not make any definite statement on this matter. But it is quite clear that the cavalry were held in highest honor among the Romans.

Chapter V.
Of the military oath.

[1] Among the Romans no one was allowed to be a soldier or attack the enemy with a sword who had not been enrolled with the accompaniment of the military oath; and it was just as much a military offense for one who had not been enrolled with an oath to kill an enemy as for one to commit an outrage upon a fellow-citizen or an ally. And so, when Pompilius—or, as others read, Paulus Æmilius—discharged one legion, and with it a son of Cato also who was serving in it, and Cato's son remained in the army because of his martial ardor, Cato wrote to Pompilius that if his son obtained leave to remain in the army, he must a second time be bound by the military oath, because, as the first oath had ceased to operate, he could not rightly fight with the enemy. And to his son, Cato wrote that he must be careful to keep out of the way of fighting, it not being right for one who was not a soldier to fight with the enemy. Cic., Offic., bk. 1.

[2] In earlier days the cavalry squadrons and the infantry by centuries voluntarily pledged their oaths with each other. Then later, in the consulship of Æmilius and Terentius Varro, for the first time and never previously, the soldiers were compelled by the military tribunes to take a statutory oath instead of a voluntary one. The commander was bound to take this oath first, then according to rank there followed the legates, then the tribunes, then the centurions, after them the decurions and then the camp-prefects, and last of all the private soldiers. This oath was taken afresh each year on the first of January.

[3] It was a solemn oath in which the takers swore by the gods that they would assemble at the consul's command and not disband without it; that they would not depart for flight or for fear, nor leave the ranks except to bring or seek weapons or to assault the enemy or to succor a comrade.

But in later times, as Vegetius says, the soldiers swore by God and De re milit., ch. 5. Christ and the Holy Ghost and by the majesty of the Emperor (to whom, says he, fidelity and devotion are due as if to God in the body) that they would diligently perform all the Emperor's commands, would

never desert the colors, nor refuse death for the Roman State. But sometimes when a great battle was expected, and at times of grave crisis, the troops would swear (so we read) that they would never return to camp except after the defeat, rout, and overthrow of the enemy. This was done in the consulship of Marcus Fabius and Cnæus Manlius, in the war against the Veii and Etruscans, for the consuls abode in the camp and would not trust the troops with arms (because in the year before, through disaffection to the consul Cæso Fabius, the infantry refused to follow up the enemy after his rout by their cavalry and returned to the camp without the command of the consul). Then Marcus Flavoleius, in his ardor for battle, took the initiative and said, "As victor, Marcus Fabius, I will return from the battle-line"; should he play false, he invokes Jupiter the father, Mars Gradivus and the other gods. After Livy, bk. 2. that the whole army, one by one, made the same invocation.

In the same way, when Pompey halted near Dyrrhachium and ordered the camp to be pitched and the army was in great alarm, Labienus, in order to reassure it, set the example and swore that he would not desert Pompey but would share the same chance, whatever fortune might have in store for him; the other legates did the same; the military tribunes and the centurions followed, and the whole army took the same Caes., Civil war, bk. 3. oath. And when Pompey decided to engage Cæsar in battle, the same Labienus was again the first to swear that he would not return to camp except as victor and he urged the others to do the same; so Pompey, approving this, took the same oath and there was none of the others who Caes., Civil war, bk. 3. hesitated to take it. Petreius, too, Pompey's legate, exacted from all his men, when they were in communication with one another about a proposed defection to Cæsar, an oath that they would not desert the army and its leaders, nor betray it, nor make schemes for themselves apart from the others. And the commander-in-chief himself took an oath in those words and compelled Afranius to take the same; then followed the military tribunes and centurions: and the men, led out by centuries, took Caes., Civil war, bk. 1. the same oath. Now Alexander's soldiers used to swear in his own words, he taking that oath first, that they would have the same enemies Quint. Curt., bk. 7. and the same friends as he had.

[4] This too was the oath which the soldiers were wont to take among the Lacedæmonians, namely, that they would have the same enemies and the same friends as their general, so that there might be one firm agreement and federation between them for woe or for weal.

[5] But the Samnites, at times of great crisis, used to hold a levy with the accompaniment of the same ancient oath-ritual as on the initiation of recruits, and after a sacrifice had been offered in solemn fashion the general bade an official summon all the noblest in family or in exploit and, while the centurions stood around with drawn swords, the

soldier was approached to the altar rather as a victim than as a sharer in the sacred rite, and he was bound by an oath not to publish what was there seen and heard and then he was made, in a weird incantation, to devote to eternal destruction himself, his family and his stock should he refuse to go in battle whither his generals led him or should he himself flee from the battle-line or see another flee and not straightway slay him; and those who refused to take that oath were cut in pieces before the altar and, lying there among the carnage of the sacrifice, were a lesson to the rest not to refuse. Livy, bk. 10.

[6] Now it appears in Æschines that the oath taken by the Athenians, on reaching puberty, was such as this: "My consecrated weapons I will in no manner handle with dishonor; whatever comrade may be mine in the battle-array, him I will not desert in danger; for our hearths and altars, alone or with others, I will strenuously fight; my fatherland, such and as great as I have found it, neither lesser nor worse, but greater and better, will I leave it."

It is a traditional story, too, that the Athenians, by reason of daily disagreements and breaches of the Law of Nations, developed bitter hatred and enmity towards the men of Megara, and that, whenever they bound their soldiers by the customary military oath, they made them also swear that every year during their term of military service, by whatever means they could, they would invade the lands and territory of Megara with a hostile army and would lay the country waste, not leaving anything intact, and would bring upon it all possible disaster of war.

It is, further, worthy of remark that when the whole Roman army took an oath to the consul, it sufficed if the centurion or tribune, on behalf of the army, swore in a set form of words with uplifted voice, and the whole array and each individual soldier with a common accord and assent took a silent vow in the same words, and this was just as binding as if each individual had said the set form of words aloud, and it was deemed sacred and inviolable.

It must also not be omitted that the tribunes were wont, on arriving where a camp was pitched, to exact from all in the camp, free as well as slaves, and individually, an oath that they would not steal anything from the camp—nay, further, that if they found anything whatever they would bring it to the tribunes. Polybius on Roman Camps.

CHAPTER VI.
Of discharge.

1. One once enrolled as a soldier can not be removed from the roll.
2. A soldier may not quit the colors.
3. Three kinds of discharge.
4. Honorable discharge.
5. Discharge invalided.
6. Ignominious discharge.
7. Ignominy not the same as infamy.
8. Who can be discharged with ignominy.
9. A fourth kind of discharge.
10. The general alone can grant a discharge.

[1, 2] When once a man has been enrolled as a soldier he can not, against his will, be removed from the roll unless he has been cashiered for unworthy conduct; for by a military *lex sacrata,* introduced in the dictatorship of Marcus Valerius Corvinus, no one who had been enrolled Livy, bk. 7. as a soldier might be removed from the roll without his consent. Nor might a soldier absent himself from the colors, or abandon his service, Dig. 4, 6, 45. until he was discharged from his oath.

Dig. 49, 16, 5. Dig. 49, 16, 13, 3; and 3, 2, 2. [3, 4] Now there were three kinds of discharge and methods of releasing a soldier from his oath—the honorable, the invalided (*causaria,* for good cause), and the ignominious.

An honorable discharge was given when the full term had been served and all the profits attending a discharge had been earned. It carried with it exemption from office-holding. On this occasion it was usual to dedicate shield, sword, and armor to the Lares (i. e., tutelar deities), just as gladiators do to Hercules, because by the aid of the immortal gods the soldier had completed his service and received his staff of discharge. The period for this discharge was on attaining the fiftieth year: Augustus, however, allowed those over forty-five, who did not wish to continue in the cavalry, the privilege of returning their horse and of obtaining a dismissal, as if after a completed term. Others were of opinion that no one could claim discharge until after ten years' service. By the Roman custom, however, the military oath was released at the end of the eleventh year and, when that had elapsed, a discharge was granted to those who had served their term. Later, the end of military service was put at the sixteenth year of service, and the Emperor Tiberius extended it to the twentieth year, and enacted that no discharge Dig. 27, 1, 8. could be obtained before then; and this agrees with our rule. And one Cod. 10, 55, 3. so discharged is exempt from all civilian offices and enjoys very many Dig. 27, 1, 8 and C. 10, 55, 2. privileges.

[5] Now a discharge is said to be "invalided" when a soldier is reported unfit for service by reason of age or bad health or some bodily weakness. This kind of discharge is not easily obtained, and only after

a physician's report and after a careful examination of the defect by an expert. When it has once been granted, the rule is not to allow the discharged soldier to be re-enrolled on the allegation that his health has been restored; but, whatever the ground of his discharge may have been, (Cod. 12, 35, 6.) he can not be re-admitted to the army without an order of the prince. (Cod. 12, 59, 2.) A soldier discharged on these grounds will also obtain exemption from office-holding, but not a perpetual exemption, and he does not enjoy (Dig. 27, 1, 8.) those privileges which those enjoy who have been discharged after a completed term; he will, however, enjoy the other privileges of veterans and will receive the rewards granted to a veteran. Now this discharge (Dig. 49, 16, 13, 2.) invalided casts not the smallest stain on the reputation, and it is also an (Cod. 12, 35, 8.) honorable variety of discharge. Those so discharged are called invalids (Dig. 27, 1, 8.) (*causarii*) by Livy in the passage, "Let a third army be raised by Titus (Bk. 7.) Quintius out of the invalids (*causarii*) and older men, to guard the city-walls."

[6] But an ignominious discharge, also called shameful (*probrosa*), occurs when a soldier is discharged from his oath on the ground of wrong-doing or crime; and a soldier so discharged is, according to the (Dig. 3, 2, 1.) prætor's edict, to be infamous, and is disqualified for any dignity, and (Cod. 12, 35, 3 and 10, 55, 1.) he may not reside in the city nor anywhere else where the emperor is. (Dig. 49, 16, 13, 3; and 3, 2, 2, 2; and Cod. 12, 35, 2.) In fact one so discharged without mention of ignominy is nevertheless taken to have been discharged with ignominy, according to Macer. (Dig. 49, 16, 13, 3.) Ulpian, however, holds that the ground of the ignominy ought to be stated in the discharge. But in the case of those temporarily discharged, (Dig. 3, 2, 2, 2.) the infamy does not continue after the lapse of the time named. (Cod. 10, 61, 1.)

[7] It should be pointed out, too, that there is a difference between ignominy and infamy, as is abundantly clear from Cicero, who says that (Republic, bk. 4, as in Nonius and Orat. pro Cluent.) a censor's mark of blame is not as grave a matter as a judgment of a court; for the censor's rebuke entails little more for the guilty party than a blush and a mark of ignominy, which is little more than nominal, and dignities are still open to the man who has such a mark, and access to the Senate, too. But it is quite different with those who have been found guilty by a court. They are perpetually barred all honor and dignity, and receive the mark of infamy, which can not be imposed save upon a judgment. Accordingly, those soldiers who had been discharged (Dig. 48, 1, 7.) with ignominy were at one time not infamous, until the prætor's edict declared that they should become infamous. And so, that may be styled (Dig. 3, 2, 1.) ignominy which our commentators call infamy in point of fact, while that is infamy proper which they call infamy in point of law.

[8] It should not be forgotten, too, that not only a common soldier, but a centurion too, and a tribune, nay, any one holding command in an army, even though enjoying the distinctions of a consul, may be discharged by a general with ignominy, and that one so discharged suffers the mark of infamy. And so Caius Cæsar dismissed Caius Anienus, (Dig. 3, 2, 2, pr.)

the tribune of the tenth legion, with infamy in the presence of the army, in the following words:

"Caius Anienus, because in Italy you stirred up the soldiers of the Roman people against the republic, and made plundering expeditions into the townships, and have been of no use to me or to the State, and have caused the State a shortage of troops in a time of necessity, for these reasons, I remove you from my army with ignominy and I order you to leave Africa and to betake yourself as much farther as you can."

Ant. Her., Span. war, bk. 5.

[9] Besides these three kinds of discharge which we have described, Ulpian adds a fourth: If a man has enlisted in order to escape civil office-holding he is ordered to be dismissed; but this discharge does not affect his reputation.

Dig. 3. 2. 2. 2.

Dig. 3. 2. 2. 2; and 49, 16, 4, 8.

Dig. 3, 2, 2, 2; and 49, 16, 4, 8, end.

[10] Further, the general or commander of the army can alone grant a discharge. And so the censor Quintus Fulvius removed from the Senate his brother Fulvius for daring to discharge home, without the consul's orders, a cohort of the legion in which he was military tribune.

Dig. 3. 2. 1.

Val. Max., bk. 2, ch. 7.

CHAPTER VII.

Of the privileges of soldiers.

Seeing that, as Cicero truly says, honor fosters the arts and we are all spurred on by the desire of glory, while those pursuits are neglected which are generally despised, the Romans (who attained such a preeminent pitch of glory in war) acted with wisdom, undoubtedly, in holding the military profession in high honor; and they, accordingly, granted numerous very ample privileges to soldiers, the heads of which—and, for brevity's sake, the heads only—we will here just touch on. Tusc. Quest., bk. 1.

[1] In the first place, a soldier can not be imprisoned for debt, nor be sued save within the limits of competence; this was a provision of Egyptian law also. Action can not be brought against him, I say, save within the limits of competence; that is (as Justinian says), within the limits of what he can afford to pay, heed being given that he is not reduced to need thereby. And so, according to the common opinion, he is not bound to make cession of goods as an insolvent. Many, however, hold that this is only so if the debt has been contracted in camp or in connection with his military profession: the matter is doubtful. Certainly the privilege in question can not be renounced for it inheres in the person and not in the contract.

Dig. 42, 1, 6 and 18.
Diod. Sicul., bk. 2.
Instit. 4, 6, 36.
Dig. 50, 17, 173.
Dig. 42, 1, 6 and Bald. thereon
Cod. 7, 71, 1, at end. Alex., col. 5, on Dig. 28, 6, 15.
Gloss. and doctors on Dig. 42, 1, 6 and text in Cod. 6, 21, 18.
Dig. 24, 3, 141 and Alex. thereon.
Cod. 4, 28, 7.
Dec. on Dig. 50, 17, 28, n. 8.

[2] Many hold that this privilege attaches also to those who have received a grant of nobility: and even if there may be a doubt on this point in common law, it has been so settled by a royal ordinance of Spain for those who are styled hidalgos. But neither by the common nor by Spanish law have these nobles any privilege not to be sued beyond their competence, for that is nowhere laid down, but only the privilege not to be imprisoned for debt. But the armor, chargers, and residences of these nobles can not be seized or taken in execution of a judgment except for a crown debt. By common law, too, the arms of soldiers can not be seized in execution of a judgment and this is sound, for the ancients used to call arms the limbs of soldiers. Nor ought execution to be levied on the pay of soldiers if the creditor can obtain satisfaction elsewhere.

[Baldus on Cod. 7, 71, 1. Alex. on Dig. 28, 6, 15. Jason on Dig. 42, 1, 6. Reg., laws 4 and 5, tit. 2, bk. 4 ord. and law 69 Tauri. Cinna, and others, on Dig. 42, 1, 6, and Cod. 28, 6, 15. Spain. Ordin., bk. 3, ch. 5, tit. 2 and bk. 4, ord. Spain. Ordin., bk. 24, with additional titles and 21, part 2. Acc. and Alc. on Dig. 50, 16, 125. Bald. on Rubr. Cod. 7, 71. Cyn. and Salic. on Cod. 7, 71, 1 col. 13. Cod. 7, 53, 4.]

[3] It must be remarked that that privilege of not being sued beyond the limits of competence does not affect the obligation nor the right of action nor the decision, for the plaintiff can sue for the whole amount; but the judge will only condemn within the limits of the defendant's competence, and even if the judge in error condemns in the whole amount the plaintiff will not obtain execution for more than the defendant can afford to pay; and the time to be regarded in this connection is the time of enforcement of the judgment; and so, although the defendant was able to pay at the time of the judge's sentence, he will nevertheless be able to plead this privilege.

[Dig. 24, 3, 12. Dig. 42, 1, 41. Dig. 24, 3, 15. Dig. 17, 2, 63, 7.]

Further, in favor of military service, sometimes not only soldiers, but those also who are desirous of becoming soldiers, have been released from imprisonment; for the consul Publius Servilius issued an edict, at the time when the Volscians were making war, that no one should detain a Roman citizen in fetters or under restraint so as to prevent him enrolling his name in the consul's lists; and, at a later day the dictator Marcus Junius, after the defeat of Cannæ, declared by edict that he would order the release from liability or from debt even of those who had dared to commit a fraud involving capital liability, and of all imprisoned judgment debtors, if they would take service as soldiers under him.

[Livy, bk. 2. Livy, bk. 23.]

[4] Very much like the foregoing first-mentioned rule is that whereby, if a soldier absent on State service has rendered his goods liable to seizure in execution by his creditors, through having failed to enter an appearance, yet the goods will not be so assigned to his creditors. And if the creditors of a soldier have sold up any of his property under the law of distress, the soldier is entitled to be restored to his former position (*restitutio in integrum*) on discharge of the debt or on proffering the price at which the property was sold, should that have been less than the value of the property; for a soldier who is in any way damnified while performing his duties to the State is entitled to *restitutio in integrum*. And so the consul Publius Servilius declared, during the Volscian war, that none should seize or sell up the property of a soldier who was on service.

[Cod. 2, 50, 4. Cod. 2, 53, 2. Cod. 2, 50, 6. Cod. 2, 50, in general. Livy, bk. 1.]

[5, 6] Again, a soldier is excused from tutorship and other public Instit. 1, 25, 14.
Dig. 50, 4, 3, 1. duties; and he can not be compelled to give evidence if he wishes not to, Dig. 22, 5: 3, 6 and 19.
lest private advantage should entail his absence from the colors where
he is the guardian of the whole State. And so, though a soldier is not Cod. 4, 65, 31.
exempt from taxation yet his property will not be confiscated for non- Cod. 4, 61, 7.
proffer or non-payment of taxes. Cod. 4, 61, 2.

[7, 8] And although things do not necessarily become my prop-
erty because they are bought with my money, yet if they are bought with Cod. 3, 32, 6.
a soldier's money he can bring action for them as owner. And although Cod. 3, 32, 8.
in an action to recover money paid by mistake the burden of proof is on
the plaintiff, yet a soldier-plaintiff is freed from this burden and it is
thrown on the defendant, who must show that he had a good title to
receive the payment—this is so, however, only when the soldier claims Dig. 22, 3, 25.
that the whole amount paid was not owing and not if his claim relates
to a part only. Ibid.

[9, 10] Another privilege of a soldier is that he is not prejudicially
affected by ignorance of law, for it is his business to understand arms
rather than laws. And so a soldier who, e. g., through ignorance of law, Dig. 22, 6: 9 and 10.
does not utilize some peremptory plea which is open to him, is allowed to
resort to it even after sentence given. This is a provision also of the Cod. 1, 18, 1.
Span. Ordin., bk. 24, tit. 24, part 2. laws of Spain. In case of delict, however, ignorance of law is no excuse, Dig. 49, 16, 2; and 48, 5, 12, pr.
for we learn by nature the obligation to abstain from delict.

[11] A soldier is further favored in not being subjected to torture
or to any punishment of plebeians, and this is so even after he has re-
ceived his discharge after a full term of service; and so he can not be Cod. 9, 41, 8; and 9, 8, 4, and Feudal Law, bk. 2, tit. 53, § 10.
Dig. 49, 16, 3, 4. condemned to the beasts or the gallows. The constitutions of Spain con-
tain a similar provision in the case of nobles. And it applies, also, to the Span. Ordin., bk. 24, tit. 21, pt. 2.
sons of soldiers and of veterans, aye, and to the grandsons, too, of such Dig. 49, 18, 1 and 3.
as have attained the highest military rank. But this privilege does not Cod. 9, 41, 11.
Cod. 9, 8, 4. Dig. 49, 16, 3, 4. extend to cases of high treason, treachery, sorcery, forgery, or private- Cod. 9, 18, 7. Cod. 9, 22, 21. Cod. 9, 5, 1.
prison-keeping.

[12, 13] Further, although military service does not release a son
Instit. 12, 4. Cod. 12, 36, 3. from paternal power, yet a soldier son-in-power is treated as independent Cod. 3, 28, 37.
(*sui juris*) so far as * *castrense peculium* is concerned; to this his father
has no claim. So far does this go that an action may lie between a father Dig. 49, 17, 4, and 10 (?).
and his soldier son-in-power in connection with the *castrense peculium*,
though in other circumstances no suit can be maintained between them. Dig. 5, 1, 4
On this principle a soldier son-in-power can not plead the *senatus con-
sultum Macedonianum* no matter what the purpose was for which he Cod. 4, 28, 25, 1.
borrowed the money. Hence, too, although there can not be a gift
between father and son-in-power, yet a gift made by a father to his son- Dig. 39, 5: 2, and 31, 2.
in-power, on some consideration of military service, is valid and what is
given forms part of the *castrense peculium*, and for the same reason a Dig. 49, 17: 3, 4 and 11
gift between spouses on the same consideration, though it would other-
Dig. 24, 1, (?). wise be revocable, is valid. Dig. 49, 17: 6 and 8.

* See Section 14, below, for meaning of this.

[14] Now, whatever a soldier has acquired in connection with his
Dig. 49, 17, 11. military service is reckoned *castrense peculium.* Even the succession to
his wife, which she has bequeathed to him in appreciation of his military
service, will, by a rescript of the Emperor Hadrian, be his, although he
Dig. 49, 17: 13 and 16. be under power of his father, as *castrense peculium.* This is not the
case, however, with a dowry (*dos*) given or promised to the husband,
for it is inseparably connected with the obligations arising from the mar-
riage and passes to their joint children, who are in the grandfather's
Dig. 49, 17, 13. power. The inheritance of a brother on the father's side, or other com-
rade, which is offered to him as such comrade, is considered to be *pecu-*
Cod. 12, 36, 4 and Dig. 49, 17, 5, at end. *lium castrense;* this is only the case if they have been on military service
in the same province or if the bequest be made in consideration of his
Dig. 49, 17, 16, at end. military service, and not otherwise.

[15] Further, in reference to the wills of soldiers, such liberal
treatment is allowed them in will-making that the solemnities of will-
making are entirely dispensed with in their case. For the Emperor
Trajan allowed soldiers to make wills in whatever form they chose, and
Dig. 29, 1, 1, and Instit. 2, 11. declared that a bare declaration of intention sufficed. Papinian accord-
Dig. 29, 1, 34. ingly gave the opinion that a soldier's intention was his testament. But
this is only true if the act of testation occurs while they are on an expedi-
Cod. 6, 21, 17 and Dig. 29, 1, 1. tion; and, if two witnesses have been summoned thereto, the intention of
the soldier may be proved in that way. This was introduced in favor of
Instit. 2, 11, 1 (middle), and Dig. 29, 1: 24 and 40. soldiers. But if the testamentary act occurs in the course of a battle, the
will is valid, even without the summoning of witnesses, and it is enough
for the soldier to have written the name of his heir on his shield or in the
Dig. 29, 1, 12. dust. And outside the exigencies of a campaign a soldier is bound by the
Instit. 2, 11, pr. (middle). common law when making his will: and this has been held to be also the
Span. Ordin., bk. 4, tit. 1, par. 6. law of Spain.

Now a will made on a campaign in accordance with this special law
Instit. 2, 11, 3 (end). for soldiers will continue valid for a year after discharge. And the sol-
Dig. 29, 1, 26. dier is allowed such unfettered capacity to make his will as he likes, that
Dig. 29, 1, 6, and Cod. 6, 21, 1 and 2. he may die partly testate and partly intestate and can institute an heir
up to a given date and thereafter take away the inheritance, giving it
directly to another; and, if he has named no one, his statutory heirs will
Dig. 29, 1: 15, 4 and 41. succeed. And the *jus accrescendi* (i. e., law whereby certain persons if
not named as heirs may be added to those who are named as heirs) does
Dig. 29, 1: 37 and 11, 2. not operate in the case of a soldier's will.

A soldier can also pass over his son in his will, and the mere passing
him over will be taken as an implied disherison, provided he did it inten-
tionally, and so also the agnation of a son after the making of a soldier's
Cod. 6, 21, 9 and 10. will does not avoid it, provided his intention be clear. And although in Dig. 29, 7, 2, 4, and Cod. 6, 36, 2. and Instit. 2, 25, 2.
Dig. 29, 1: 7 and 36 (1). codicils an inheritance can not be directly bequeathed, yet it may in the
Dig. 29, 1: 36, pr. and 19. case of a soldier's inheritance. A soldier, too, may make a will while
Dig. 29, 1, 11, 1. uncertain about his status; and a will made in military fashion by a civ-
Dig. 29, 1, 15, 2. ilian is valid if he be a soldier at death.

Further, although the will of a civilian is not annulled by mere intent or by a mere attempt, not carried through, to make a subsequent will, yet the will of a soldier is annulled by mere intent without any difficulty. (Instit. 2, 17, 7 and Dig. 28, 3, 2, and 28, 1, 21, 1.) A soldier can even die leaving two valid wills. (Dig. 29, 1: 15 (1 and 2).) Further a soldier can give away more than three-fourths of his estate in legacies and these legacies suffer no abatement under the *lex Falcidia*. (Dig. 28, 3: 1 and 2. And 29, 1, 19, pr.) A soldier can make a valid will, although dumb or deaf. (Dig. 29, 1: 17, 4 and 18. Cod. 6, 21, 12 and Dig. 35, 2, 1) (Dig. 29, 1, 4 and Instit. 2, 11, 2.) And a soldier son-in-power can dispose of his *castrense peculium* by will; and this applies even though he be in an unarmed branch of the service. (Dig. 29, 1, 11.) And the wills of soldiers are not liable to impeachment as unduteous. (Dig. 5, 2, 32.) And a soldier son-in-power will not only be able to make a will for himself, but also a will for his son by way of pupillary substitution, so far as regards his *castrense peculium*. (Cod. 3, 28, 24.) But this testamentary privilege so granted to soldier sons-in-power must not be extended to those who are below puberty and have (as sometimes happens) been allowed to enlist as a special favor. (Dig. 29, 1: 20 and 15, 4.) (Dig. 27, 1, 8.) Such a person will not be able to make a will either by common or by military law, because of the unstable character of that age. Herein Justinian corrected the ancient law so far as it allowed this. (Cod. 6, 21, 18.)

Further, a civilian can not make a direct substitution to a stranger or his own son, over the age of puberty, whom he has instituted heir, in such a way that if he enters on the inheritance and shortly thereafter dies the substitute may become heir; but the only way in which this can be effected is by the testator binding his heir by a trust (*fidei commissum*) to pass on the whole or a part of the inheritance to the latter. A soldier, however, is allowed to do this in the first-mentioned way. (Instit. 2, 16, 9.) (Dig. 28, 6, 15 and Cod. 6, 21, 6 and)

[16] Further, those who have been capitally condemned for military offenses may make wills of their *castrense peculium*, provided there has been no breach of the military vow and that the presiding judge gives permission in his judgment. (Dig. 29, 1, 5, and 29, 1, 41.) (Dig. 29, 1, 11, and 28, 3, 6, 6.) This is not so in the case of a civilian. (Dig. 32, 22, 1: and 24, 1, 32, 8.)

[17] And if persons condemned for a military offense die intestate the next of kin will succeed, to the exclusion of the treasury. (Dig. 28, 1, 8, 1, and 4.) Indeed the property of a soldier who dies without leaving a successor is given to his legion and not to the fiscus. (Dig. 38, 12, 1 and 2.)

[18] Lastly, a soldier who has unadvisedly entered on an inheritance is not liable beyond the assets of the inheritance. (Dig. 28, 3, 6, 7 and Cod. 6, 62, 2.) (Cod. 6, 30, 22 (end).)

[19] Again, the favor which is shown to soldiers does not always manifest itself in an extension of their testamentary capabilities, but sometimes also in a restriction of them. Accordingly, although it is allowable to bequeath or make a gift to a concubine or mistress, yet a soldier can not give or bequeath anything to a woman suspected of being of loose character. (Dig. 39, 5: 5 and 1.) A disposition, also, which is disgraceful or immoral is no more valid when made by a soldier than when made by a civilian. (Dig. 29, 1, 41, 1: and 34, 9, 14. Cod. 5, 16, 1.) (Dig. 29, 1, 29, 2.)

[20, 21] Add now to what has gone before the unique and glorious military privilege that when a soldier dies in war for the sake of

his State he is taken as continuing to live through the glory of his exploits—only he must die in battle in actual fighting, and not even in a siege or in any other way simply connected with war; and so a soldier son-in-power who falls fighting in battle for his country counts towards the *jus trium liberorum* (i. e., three-children privilege) which excuses his
Dig. 27, 1, 18. father from tutorships and furnishes an excuse in the case of some other
Instit. 1, 25, pr. (middle). civil duties. Accordingly, when the *Lex Julia de maritandis ordinibus* Dig. 50, 5, 14.
(i. e., about the marriage of the different ranks) provided that that one of the consuls should have priority and have the right of carrying the *fasces* (i. e., the special emblem of the highest magistrates) who had more children in his power than his colleague had, those children were
Gellius, bk. 2, ch. 15. to be counted in, who had been lost in war.

[22] This privilege admits of many other applications; and so if a statute should provide (as is the case in many jurisdictions) that, in the succession to a father, a second son who survives his father is preferred to a grandson by the eldest son who predeceases the father, I am of opinion that, if his eldest son had fallen while fighting for the State, in this case the grandson is to be preferred, and for this reason, i. e., that his father (who is entitled to the grandfather's succession by the law of primogeniture) is deemed to be ever living; and in a precisely similar set of facts I have heard that the matter was so adjudged, notwithstanding the rule that soldiers' privileges are not to be extended to another
Dig. 26, 7, 40. person's injury and the rule that exceptions of an advantageous kind (*beneficia*) are not usually either extended or granted to another per-
Dig. 36, 1, 12. son's injury. These latter rules do not operate here, because no injury
Cod. 8, 48, 4; and 1, 19, 7, Dig. 8, 3, 17. is done to the second son, seeing that it is not a case of something being taken from him, but only of something not being acquired by him. For (as Ulpian put it) persons are not reckoned as losing a thing which was
Dig. 50, 17, 83. never theirs and, as a rule of Paulus says, a man can not be held to cease
Dig. 50, 17, 208. to own what he has never owned. And that is the principle of Ulpian's dictum that no fraud is committed on creditors when the debtor omits to acquire something, but only when he diminishes the property which he
Dig. 50, 17, 134; and 42, 8, 6, pr. actually has.

Now Papinian's pronouncement that soldiers' privileges are not to be extended to the injury of another person has no application to the case before us, for he is speaking of a case to which a soldier's privilege is not extended and in which it is clear that a wrong was being done to
Dig. 26, 7, 40. another. Accordingly I hold that in the case which we are discussing the grandson must be preferred to his uncle notwithstanding the statute—especially as, by common law, a grandson represents his dead father even
Instit. 3, 1, 6. when he has died otherwise than in war; and therefore, as the statute
Panormit. on c. 10, X, 3, 30. Text in c. 1 (on 1), X, 1, 17, bk. 6 (?). derogates from this common law, it ought to be restrictively interpreted.

[23] Add to the foregoing that a royal ordinance of Spain provides that any rewards which a man has earned for distinguished services

in the field are, on his death, to be due to his children and next of kin. It was the Roman rule, and enacted at Athens also by a law of Solon, that the children of those who had fallen in battle should be brought up and properly educated at the public expense. And Constantine added that the sons should be summoned to the military profession of their father.

Span. Ordin., bk. 5, tit. 27, par. 5.

Cod. 12, 47, 1 and 2.

[24] It is, further, to be remarked that these military privileges are only granted to soldiers if they are performing their service with bravery and zeal, and they are not extended to veterans, though they, too, have privileges of their own. But oarsmen and sailors of the fleet are "soldiers" and enjoy military privileges.

Cod. 2, 50, 8. Dig. 22, 3, 25, 1. Dig. 29, 1: 13 and 14, pr. Cod. 3, 28, 37 1 (c.) (mid.). Dig. 35, 2, 40; and 3, 3, 8: 2 and 3. Dig. 37, 13, 1, 1 (mid.).

Dig. 49, 18; and 38, 12, 1 and 2. Cod. 12, 46: 1, 2, 3, 4. Instit. 2, 11, pr. (mid.). Dig. 27, 1, 8.

[25] And, besides, certain military privileges are granted not only to soldiers, but to others as camp-followers; and in the forefront is this, that those who are not of a rank which entitles them to military privileges in will-making will be allowed, if kept prisoners by the enemy, to make their wills in whatever way they like and can.

Dig. 29, 1, 44.

[26] So, also, women who are absent with their husbands on the military service of the State receive the same assistance as soldiers if they are deprived of some legal remedy by lapse of time. A rescript of Alexander is to that effect; and Diocletian and Maximinian issued a rescript that a woman absent with her husband on a campaign was not to be adversely affected by a prescription *longi temporis* (i. e., based on lapse of time).

Cod. 2, 51, 1.

Cod. 2, 51, 2.

On the same lines is Ulpian's opinion, that those who have been lost in war are to be counted for the purpose of providing excuse from tutorship, of whatever sex or age they may be, provided they died in battle—for it is quite clear in ancient histories that women used to serve in array of battle and have sometimes rendered highly distinguished services in war. Thus in the Sabine war, the Sabine women at Rome, on whose account the war broke out, had the hardihood to throw themselves by a sideways movement among the flying missiles, their hair streaming, their gowns rent, for their womanly fear (as Livy says) was overborne by their sufferings, and they thus succeeded in composing the anger and hostility of the opposed forces. And that, too, is a memorable thing that is told of the Cimbrian women whom, as well as their husbands, Marius had to fight in battle and whose death was even more glorious than their fighting, for when they failed to obtain their freedom by sending an embassage to Marius, they suffocated or strangled their children indiscriminately and either killed each the other or, making a rope of their hair, hanged themselves on trees or the shafts of wagons. And the German women are reported to have more than once restored their line of battle when it was breaking.

Bk. 1.

Florus, de gest., Rom., bk. 3, ch. 2.

Crinit., de honest. disc., bk. 12, ch. 8.

[27] Now, although many doubt whether soldiers of the present day enjoy these privileges, it is nevertheless the better opinion that those who are on the service-lists and are doing their service with bravery and

zeal are granted these privileges—at any rate such privileges as have not been abolished in practice, and it is immaterial that in their case the solemnities wherewith in olden days soldiers were enlisted, with an oath of military service, have been dispensed with. For we notice in our days an analogous disappearance of ancient solemnities in our actions at law, which are, none the less, of equal efficacy. The ground and reason for granting soldiers such ample privileges was that, being thus freed from all anxieties, they might devote themselves, unhampered, to arms for the safety and defense of the Roman dominion. This reason applies equally to our soldiers, and so the law ought to remain the same. This view has the approval of men of highest learning, too.

Dig. 1, 2, 2, 6.
Cod. 2, 57, 1 and 2.
Cod. 2, 7, 14; and 2, 12, 7 (end).
Dig. 29, 1, 1.
Cod. 4, 65, 31
Jacob de Rauen., Cyn., Bald., Bart., Salicet and others on Cod. 1, 18, 1.
Alb. on proc. Rom. civil. 43, and consil. 506.
Alex. on Dig. 28, 6, 15, nu. 23. Decius on Rubr. Cod. 6, 21, mentioned by Francisc. Zoannettus on Roman Emp., nu. 80.

Dig. 3, 5, 46; and 48, 1, 8.
Cod. 2, 11, 15.
Dig. 9, 2, 32, pr.

CHAPTER VIII.
Of military courts.

1. A soldier can not be sued save before his own judge:
2. Except he be a deserter,
3. Or has agreed to waive this right,
4. Or has become a soldier after issue of the summons,
5. Or has given perjured evidence,
6. Or is also engaged in trade.
7. The Roman consuls only had power when on active service to punish a Roman citizen capitally without consulting the people.
8. The tribunes had not power of life and death over the troops.

[1, 2] Soldiers can not be summoned before any but their own judge, or be punished by any other if in fault; and so, if arrested by a civil official, they ought to be remitted to their own judge, except in the case where a soldier while deserting commits some very serious offense, in which case the president of the province can take cognizance of the offense and punish the soldier in the place where it occurred. But otherwise a general or commander of troops has no jurisdiction over provincials and a provincial president none over soldiers. Cod. 3, 13, 6; and 9, 3, 1. Cod. 9, 3, 1. Dig. 49, 16, 3. Cod. 3, 24, 1. Dig. 48, 2, 22; and 48, 3, 9. Cod. 9, 24, 1.

[3, 4] If, however, a soldier shall have declared in a written instrument that he will waive the *præscriptio fori* (i. e., plea to the jurisdiction) which his profession entitles him to set up, the agreement must be adhered to. So, also, if a man becomes a soldier only after receipt of a summons, he is, as it were, anticipated and can not challenge the forum; for a lawsuit ought to be brought to a conclusion in the same circumstances in which it was begun. Cod. 2, 3, 29. Dig. 5, 1, 7. Dig. 5, 1, 30.

[5, 6] Further, a soldier who has given perjured evidence subjects himself to the jurisdiction of the judge concerned even though he be a civilian. A soldier, too, who is a trader, subjects himself thereby to the judge of that trade. Cod. 4, 20, 14. Cod. 3, 13, 7.

Further, every one ought to answer in a military court regarding public matters which he carried through in the course of performing his military service and with regard to military accounts, and without being able to set up the *præscriptio fori,* and this although he has retired from the service; and a volunteer who is liable to capital accusation (and who, according to a rescript of the Emperor Trajan, is not exempt from capital punishment) should not be remitted to the place where the accusation is brought, but should be punished in the place where he ought to have been tried if the charge had been a military matter. Cod. 3, 21 2. Dig. 49, 16, 4, 5.

[7] Further, it is to be remarked that, although consuls were prevented by the *Lex Valeria,* which Valerius Publicola introduced, and by

the *Lex Porcia,* from capitally punishing a Roman citizen without the command of the people, and although they were only left the power to order imprisonment and public chains, yet when on active service they had the right of inflicting punishment at their discretion; and this was also allowed to prætors and other commanders of troops. The jurisconsult Venuleius, however, is of opinion that this was limited to the case of private soldiers, they being meaner and less regarded. Whence it may be inferred that such punishment could not be inflicted on others without reference to the emperor.

Dig. 1, 2, 2, 16. Dion. Halic., bk. 10. Polyb., bk. 6, de re milit. ac domest. Rom. Livy, bks. 2 and 4 Cicero, Philipp. 3. Dig. 48, 3, 9. Nov. 74, § 4 (3).

[8] The tribunes, too, and others below the rank of general had no power of life and death over the troops, but were only allowed to inflict light punishment, as is clearly indicated by Marcianus, when he says that it was the business of the tribune to punish offenses within the limits of his authority. And what Tacitus says about the notorious Pannonian revolt is consistent herewith. He writes that Municius, the camp-prefect who had the chief command at the time owing to the general's absence, quieted that revolt in its beginnings by the execution of two soldiers—which was rather by way of salutary example than under any legally conferred authority.

Dig. 49, 16, 12 (end). Annals, bk. 1.

Further, the business of military courts can be conducted, according to a rescript of the Emperor Trajan, even on holidays.

Dig. 2, 12, 9.

Chapter IX.
Of the punishment of soldiers.

1. Twofold reason for punishing offenses.
2. Military punishments.
3. Military offenses either individual or joint.
4. *Fustuarium* (cudgeling), what it is.
5. Decimation.
6. Romans harsh in military punishments.
7. The capital penalty remitted where the offense is due to wine or passion.
8. The Romans in their judgments did not balance good deeds against bad ones.
9. The Persians did the opposite.

[1] Plato, in his *Gorgias* (so Gellius tells us), opines that there is a twofold reason for punishing offenses: the one being the chastisement and correction of the offender, so as to make him more heedful and more ready to behave properly; this in the case of lesser offenses is ordinarily by a fine or some light restraint with a fine added; the other is by way of example, in order to deter others from similar offenses by the fear of punishment. And in the case of the graver offenses it is important that this should be inflicted publicly. Noct. Attic., bk. 6, ch. 14.

[2] And so some military punishments are of the graver order and are capital; others of the lighter order are necessarily inflicted by generals on delinquent soldiers in order to preserve military discipline, and vary according to the greater or less gravity of the offense.

[3] Now the offenses of soldiers are either individual or joint. An individual military offense is one committed by a soldier as such, Dig. 49, 16, 2. e. g., behaving otherwise than military discipline requires. Now mili- Dig. 49, 16, 6. tary punishments, according to Modestinus, are as follows: Castigation, Dig. 49, 16, 3, 1. fine, imposition of tasks, change to an inferior kind of service, degradation, and ignominious discharge; but soldiers are not sent to the mines or tortured or condemned to the beasts or to the gallows, nor are they Dig. 49, 16: 3 (1) and 4. liable to any punishment of the plebeians. Dig. 48, 19, 9, ?. Cod. 9, 47, 5, and ch. on Soldiers' privileges, above.

Dig. 49, 16, 3, 15. [4] But for a grave offense they may be capitally punished or cudgeled. On Roman camps. The latter punishment was as follows, according to Polybius: the tribune took a cudgel and just touched the condemned man and thereupon all in the camp struck him with cudgels and stones, so that the victims were generally killed in the very camp, and if any one escaped it did not stand him in good stead, for he was not allowed to return to his country nor did any of his kinsmen dare to shelter him at home; and so those on whom this trouble fell were doomed to perish. This kind of punishment was called *fustuarium*, according to Cicero, who says, "The Philipp. 3. legions who abandoned the consul deserved *fustuarium*." A like kind of punishment is in vogue even at the present day on service. It is this

that the jurisconsults are thinking of when they use the phrase "to be cudgeled, killed, punished"; but elsewhere, when they use the phrase "to be cudgeled, chastised, admonished," they are not thinking of the capital variety, but of the lighter punishment; for this latter punishment with the cudgel is much lighter than scourging, according to Marcellus, Callistratus, and Hermogenianus, and the annotations of Hieronymus Verrutius.

As in Dig. 9, 2, 7, 1, and 29, 5, 1, 17, and 48, 19, 8, 1.

As in Dig. 1, 12, 1, 10; and 47, 10, 45; and 48, 19, 7; and 1, 15: 3 (1) and 5; and 48, 19: 10 and 28, 1; and 49, 16, 3, 15. Cod. 10, 59, 1

In Dig. 48, 19, 10.

In Dig. 48, 19, 28, 2. Dig. 47, 10, 45. De verb. signif., bk. 6.

[5] Further, if several soldiers join together to commit some crime, or if a whole legion deserts, they are ordinarily cashiered. Sometimes the punishment was the very common one of binding the leaders of disturbances to a stake, or beheading them with an axe, and then choosing by lot one man in every ten of the rest and sending him to punishment. This can be gathered from the words of Cicero (*Pro Cluentio*) where he says: "Our ancestors laid it down that if a crime against military order was committed by several jointly, some were selected for punishment by lot, so that in that way fear might strike many, while the actual punishment struck but few."

Dig. 49, 16, 3 (at end).

And among other military punishments were the following: to postpone the year's pay, and in such cases not to advance any pay so that those so punished were called "bankrupts" (*ære diruti*), or to reprimand in public in a general assembly or to dismiss without any advantages in the shape of pay; to forbid the place in which they rested to be reckoned in the camp, so that they lay on the ground and in the open; to leave them outside the camp-ditch without tents; to flog with vine twigs; to order them to give in their spears—and this punishment was called the punishment of the spear (*censio hastaria*), and generals did not usually inflict it by way of punishment for any small offense, but for some grave offense. Now soldiers were ordered to give in their spears whose spear was taken away from them by way of disgrace for some shameful conduct or riotous living; for just as brave soldiers who for the first time had come out of a battle victorious were presented with an unstained spear as a mark of glory, so the cowardly and contumacious were deprived of their spears. This was as much as to say that the hope of military service was taken from them.

Those were publicly reprimanded on parade who had their arms in rough condition and insufficiently polished or whose horses were overlean and scraggy, or who, on the day appointed for a battle, submitted over-reluctantly to orders and sought opportunities for shirking.

Alex. ab Alex., Genial. dies, bk. 2, ch. 13.

There was also in olden times a military punishment which consisted in ordering a soldier's vein to be opened, by way of disgrace, and blood let: Aulus Gellius thinks that this was first employed in the case of soldiers of sluggish disposition, whose natural habit was altering for the worse (so that it did not seem to be so much a punishment as a medicine); but in later times it became, by use, a method constantly resorted

Noctes Atticae, bk. 10, ch. 8.

to in the case of numerous other offenses, as if to suggest that all delinquent soldiers were somewhat wanting in health.

[6] Now, although in other departments rather mild punishments commended themselves to the Romans, who had a rule in ancient times that a man was not to be fined an ox in preference to a sheep—the assessment of severer fines being one ox or more, but of lighter fines a sheep—yet as regards military punishments they were always on the severe side, inasmuch as military discipline calls for a harsh and severe kind of chastisement. Hence, although the consuls were forbidden to punish a Roman citizen capitally, yet on active service they could inflict punishment at discretion, as we have elsewhere said. Hence, also, it was very rare for the emperors to pardon a second offense. For, as Marcus Cato wrote in his treatise *De re militari,* mistakes made in other circumstances can be corrected afterwards, but offenses committed in war do not admit of being put right, seeing that the punishment itself follows on the heels of the mistake and there is an avenger of cowardice or clumsiness standing ready who never shows any indulgence to a delinquent enemy. And that consummate general Lysimachus used to say that a second mistake is not possible in war, for that is a place where blunders or heedlessness or ignorance can not be put right; for in war a little slip often produces the most serious results. Nevertheless, certain delicts when committed by a civilian call for no punishment, or perhaps, on the other hand, for a rather severe one, which, when committed by a soldier, call respectively for a rather severe or a rather light punishment (so Marcellus held). And it is well-known that certain military offenses are punished capitally, these all being acts such as can not be done except guiltily.

Above, on Military courts.

Dig. 48, 19, 14.

As in Dig. 49, 16: 6 (1) and 7, 8 and 14.

[7] The capital punishment is, however, remitted in the case of those who have erred through wine or in frolic. They are merely sentenced to a change to an inferior kind of service; for intention and deliberation are distinguishing marks of crime, but they are non-existent in a drunken man. Pyrrhus, accordingly, let some men go scot-free who, when drinking, had loaded him with abuse and curses, and who frankly admitted it, throwing all the blame on the liquor, and who even said they would have said things far worse if they had had more wine—aye, and would even have killed the king if the bottle had not given out. The Emperor Charles V, on the contrary, issued a decree that drunkenness was not to be any excuse for crime; this was due to the excessive frequency of drunkenness at that time. And Pittacus introduced a law providing that one who offended when drunk was to pay twice the fine which would be inflicted on a sober man.

Dig. 49, 16, 6, 7, at end.

Dig. 48, 8, 1.

Val. Max., bk. 5, ch. 1.

Plutarch, Banquet of the Seven Wise Men.

[8] It is, further, highly remarkable that the Romans, who elsewhere attached the highest importance to every man's merits and virtue, refused, nevertheless, to display on the judgment-seat any indulgence to

crime, even where most important services had been rendered to the State, or to balance good deeds against bad. The most conspicuous illustration of this is the case of Publius Horatius: though he wore, as victor, the threefold spoils of the Curiatii, and though his unaided valor had won their empire for the Roman people, he was charged with treason (*perduellio*) for stabbing his sister when she wept at the death of Curiatius, her betrothed. And he was in a highly critical position, from which he was rescued more by the entreaties and pathetic appeal of his father than by his recent achievement. Livy, bk. 1.

And when Marcus Manlius Capitolinus was accused of aiming at kingly power, although his defense of the Capitol had saved Rome and although he led out into view nearly four hundred men to whom he had lent money without interest, thus preventing their property being sold up and themselves carried off as assigned debtors (*addicti*), and although, besides all this, he displayed to view the spoils of slain enemies and numerous gifts of commanders and had recalled his exploits in war in a speech, the greatness of which matched the greatness of his deeds, yet his crime (says Livy) outweighed all, and Manlius was condemned by the judgment of the people and was hurled from the Tarpeian rock. Bk. 6.

[9] The Persians, on the other hand, never condemned a man unless he was convicted of having done more harm than good to the State. Diod. Sicul., bk. 1.

Chapter X.

Of the contumacious and those who disobey the orders of their officers and who do not defend them.

1. He who disobeys a command is punished capitally.
2. A soldier who resists a tribune or centurion when proposing to chastise him.
3. A tribune may not overpass bounds in chastisement.
4. Those who refuse to defend, or who desert, their superior officers.
5. He who does what his commander has forbidden.
6. Discipline of their camps more important to the Romans than love of children.

[1] In order to establish military discipline, it is before all necessary that those who command the army or soldiers have their men obedient to orders. Accordingly, capital punishment is decreed for him who disobeys orders, and Augustus dismissed the whole of the tenth legion with ignominy when it was contumacious and disobedient. Dig. 49, 16, 3, 15.

Further, when Lucius Æmilius Paulus was despatched into Macedonia, he made it his first care to provide that in the movements of his army everything should be done in ordered fashion and without noise, at the first beck and command of the general. For, when proclamations of what was to be done were made to all at the same time, not every one heard them distinctly, and, as the orders were not received in clear form, some, making additions for themselves, did more than was ordered, while others did less, and dissonant shouts were raised in every quarter, insomuch that the enemy knew sooner than the soldiers themselves what was intended. The general, therefore, directed that the military tribune should communicate the order, secretly, to the chief centurion of the legion, then he to the next, and so on, each telling the next to him in rank what had to be done, whether the instructions were to be conveyed from front to rear or from rear to front. Livy, bk. 34.

[2] Now we have elsewhere told how the tribune and the centurion have power of chastisement over the troops. (Above, ch. on the Office of Tribune.) A soldier, accordingly, who resisted the tribune or centurion when proposing to chastise him, was branded with the mark (*nota*) of disgrace, and this meant that no one might supply him with fire or have any dealings with him. But if he had laid hold of the vine-staff, he was put to inferior service; while if he had broken it intentionally, he was capitally punished. (We have elsewhere shown how vine-staves were carried before the tribunes, and not *fasces*.) Dig. 49, 16, 13, 4.

Dig. 49, 1, 12, end; and 19, 2, 13, 4. [3] A tribune must, however, give heed not to overpass due limits in chastisement; and should he assault a soldier without justification and not with any intention of chastisement for some offense, I think the soldier may lawfully defend himself (By inference from Cod. 10, 1, 5.); but in other cases resistance is unlawful. All contumacy towards the general or commander is a capital offense. (c. 97, C. 11, qu. 3)

Dig. 49, 16, 6, 2. [4] Again, capital punishment is decreed not only for those who have offered violence to their commander (Dig. 49, 16, 6, 1.), but also for those who have neglected to defend him or who, though defending him, have allowed him to be killed (Dig. 49, 16: 2 (end) and 6 (end).); and a royal edict of Spain has decreed the same for those who desert their king (Span. Ordin., bk. 3, tit. 19, par. 2.). Now the Roman Senate treated it as a most serious matter that the soldiers had allowed the consul Petilius to be killed when he was bravely fighting against the Ligurians, and they refused to advance the year's pay or to make any other payments to the legion, because it had failed to offer itself to the enemy's weapons for the safety of their general (Val. Max., bk. 2, ch. 7.). Indeed, the Celtiberi deemed it a sin to survive a battle in which the chieftain was killed, to whose safety they had dedicated their lives (Val. Max., bk. 2, ch. 6.). And Cæsar tells how among the Gauls there were men bound by a similar obligation, whom they styled " soldurii." (Gallic war, bk. 3.)

[5] Again, so stringent is the rule requiring obedience to a commander's decrees and observance of his orders that capital punishment awaits him who does anything which his commander has forbidden or fails to carry out his commands, even though he meets with success therein (Dig. 49, 16, 3, 15.). This discipline had very stern champions in Postumius and Tubertus and Manlius Torquatus. One of these men had his own victorious son beheaded for attacking the enemy with an escort, of his own motion and without any orders to do so, and this though he had routed the enemy. And another of them, whose *cognomen* (surname) thereafter was Imperiosus, had his son flogged in sight of the whole army and beheaded for accepting, against his father's orders, a challenge to combat given by Geminius Metius, the Tusculan general, and this although his descent into battle was crowned with a glorious victory and he had brought back magnificent spoils. And Manlius, the son, when the troops were on the point of rising in favor of him, insisted that he was not of sufficient value for discipline to be destroyed on his account and he induced them to allow his punishment to be carried out. (Livy, bks. 4 and 8. Val. Max., bk. 2, ch 7.)

Gell., bk. 9, ch. 13. [6] And so Paulus says that the Romans gave the discipline of their camp priority over their love for their children. And the dictator Papyrius displayed no less severity towards his master of the horse, Quintus Fabius, for leading the troops out, contrary to orders, although he had returned to the camp after a signal defeat of the Samnites (Dig. 49, 15, 19, 7.). The dictator was not moved by his valor nor by his success nor by his high birth, but had him stripped and flogged and persisted in demanding his execution from the Roman people, and from the tribunes of the plebs

who were interposing their veto on his behalf. It was, then, just as much a military offense to fight irregularly and contrary to orders, even after being challenged, or to be slow in obeying the trumpeter's signal to retreat, as to do an injury to a fellow-citizen or an ally. And Cyrus, accordingly, is said to have commended the soldier who, being just about to kill an enemy when he heard the signal for retreat, yet drew back his sword and restrained the blow and let the enemy go.

Livy, bk. 8. Val. Max., bk. 2, ch. 7.

Chapter XI.

Of truants.

1. A soldier may not be away from the colors without leave.
2. A soldier who quits the ranks is flogged.
3. A truant (*emansor*) and his punishment.
4. One who crosses over the ramparts.
5. One who does not return on the day his furlough expires.

[1, 2] It was provided by the military law of Rome that no soldier, unless he had permission, was to absent himself from the colors or quit a battle-field or abandon a post or flee from camp or go too far afield, and that the precautions of reconnoitering and watchwords and supports should not only be taken when marching in battle-array, but also when out collecting wood or making a foray; and, in a word, that all precautions and arrangements should then be taken as if in face of the enemy. But he who wanders outside the fortifications, out of hearing of the trumpet, unless it be by the orders of the general or tribune, is liable to military correction, the danger being that soldiers who are straggling along in loose order and carelessly may stumble into some hostile ground and be exposed to slaughter and other risks. And another reason for this is that they may be restrained from plunder. Hence one who quitted the ranks when on march was flogged or was put
Dig. 49, 16, 3, 16. to inferior service.

Lysander of Lacedæmon was once chastising a man who had left the line of march and, when the fellow said that he had not done so for any purpose of plunder, made answer, " But I mean you not even to look as if you were going plundering." And when Alexander Severus found any one turning aside to loot something or other, he had him flogged and ordered a herald to make proclamation during the chastisement, " Whatsoever ye would that men should do unto you, do ye even so unto them," a saying he had picked up from the Christians. And when Pompey was sent as legate into Sicily he heard that the men were in the habit of wandering off during the march and committing assaults and looting; so he checked their random roamings with punishments and
Plut., Apoph. affixed his seal to the swords of those who were sent on his errands.

[3] Further, one who makes off for some time without leave and then returns to the camp is called an *emansor* (truant). His offense is
Dig. 49, 16, 3, 2. less heinous than that of a deserter, just as a slave with a habit of wan-
Dig. 50, 1, 225. dering is not so bad as a fugitive slave. And inquiry is made into the circumstances of his truancy—why the man went away and whither and

what he did there, and pardon may be given where the reason was his health or his affection for his relatives by blood or marriage or where he was in pursuit of a fugitive slave or there was some other such explanation. Moreover, a recruit who has not yet learned military discipline is a fit subject for pardon. Dig. 49, 16, 4 (end).

[4] When, however, an attack by the enemy is imminent, a soldier who stays away reconnoitering over long, or leaves the fosse, is punished capitally. So is he who crosses over the ramparts or enters the camp by climbing the wall, for walls have ever been held sacrosanct. Dig. 49, 16, 3, 10. Dig. 49, 16, 3, 15. Instit. 2, 1, 10.

[5] He, too, who has been allowed furlough and does not return on the appointed day is to be treated (so Modestinus ruled) just as if he had been a truant (*emansor*) or deserter during the time by which he exceeded his furlough; but he should first be allowed an opportunity of explaining whether he happened to be detained by some accident which could be held fit ground for a pardon. So wholly undesirable was absence from the colors considered that, according to an opinion given by Ulpian, a soldier who was away on furlough was not held to be away on State service, and Javolenus was of the same opinion with regard to one who, e. g., was wandering or taking his ease at home. For, as Ulpian says, those only are held to be away on State business who are away compulsorily and not for reasons of their own convenience. And we have elsewhere said that leave of absence should be given to soldiers as sparingly as possible. Dig. 49, 16: 3 (7) and 14. Dig. 49, 16, 1. Dig. 4, 6, 34. Dig. 4, 6, 36. Above, ch. on the Office of Tribune.

Chapter XII.
Of deserters.

1. Who a deserter is, and the manner of his punishment.
2. Those who screen a deserter.
3. A deserter who is reinstated does not get paid for the time of his desertion.
4. He who has withdrawn his son from military service.

[1] A deserter, in legal intendment, is one who is recaptured after [Dig. 49, 16, 3, 3.] a long period of unauthorized absence. Now when once a man was enrolled as a soldier, he might not quit the service unless duly discharged; so to do was reckoned one of the gravest crimes. All deserters, however, are not to be punished alike, for the man's grade and pay and antecedents will be taken into account. It is material, too, whether he deserted alone or with a number, and whether for the first or some subsequent time, and whether he added some other crime to that of desertion; and account must be taken, too, of the time at which the desertion took place, for he who deserts in time of peace is degraded if a horse-soldier and put to inferior service if in the infantry, while desertion in [Dig. 49, 16, 5.] time of war is a capital offense. Severer penalties, too, are provided in [Dig. 49, 16, 4, 9. Cod. 3, 27, 2. Cod. 12, 45, 2.] the case of one who after his desertion re-enters the service elsewhere or allows himself to be levied. Commanders allowed any one to maltreat a deserter, but this was confined by the Emperor Leo to the case where the man resisted after he was discovered. The property of those who [Cod. 12, 35, 4.] have died while deserting is publicly sold.

[2] Now not only are the deserters themselves to be punished, but also those who screen them, e. g., a judge who, for favor or by careless- [Cod. 12, 45, 1.] ness, has neglected to deal with a deserter. He, on the contrary, who [Ibid.] gives up a deserter is rewarded: and indulgence is commonly shown to a [Dig. 49, 16: 5 (4) and 4 (13).] deserter who gives himself up, unless it be after five years' desertion, for [Dig. 49, 16, 13 (end).] such an one is to be deported.

[3] And although by indulgence a deserter has been reinstated, he [Cod. 12, 35, 5 and Dig. 49, 16, 15.] can not claim pay for the time of his desertion.

[4] Penalties no less severe than those enacted against a deserter were enacted against one who withdrew his son from military service. If he did this in time of war he was punished by exile and loss of property; and if in time of peace, he was flogged and the young man who had been claimed was put to inferior duties. And, by a rescript of the [Dig. 49, 16, 4, 11.] Emperor Trajan, he who maimed his son at the time of a levy, so as to render him unfit for military service, was to be deported.

And Cæsar, when the circumstances required it, is said to have been, among other things, a very sharp inquisitor of the seditious and of deserters, and a very ruthless punisher, too. And it is on record that Aufidius Cassius set the novel example of cutting off the hands and feet of deserters, declaring that it would be better for discipline that the criminal should drag out a wretched existence than that he should be killed.

Chapter XIII.

Of deserters to the enemy and traitors.

1. Deserters to the enemy very severely dealt with.
2. He who can return but does not is reckoned a deserter to the enemy.
3. How those who carry intelligence to the enemy are to be punished.
4. Secrets of the council not to be disclosed.
5. The enemy's spies.
6. Whether it befits a gentleman to be a spy.
7. Very unsafe to trust to deserters from the enemy.

[1] Very severe measures were always taken against deserters to the enemy, as being guilty of no ordinary crime and as traitors to their fatherland and their fellow-citizens, and they were deemed unworthy of pardon. For, as Paulus says, "A deserter who with evil design and traitorous intent has abandoned his native country is to be reckoned an enemy and punished capitally; and wherever he is found he may be killed like an enemy and he is within the *Lex Julia majestatis* (on treason); he can be tortured or condemned to the beasts or gallows, although his fellow-soldiers are not liable to those punishments. He, too, who is arrested when planning to desert to the enemy, is capitally punished." And so the senator Fulvius ordered his son, who was caught on the way to join Catiline, to be killed.

Dig. 49, 16, 19, 8. Dig. 49, 16, 7. Dig. 48, 8, 3, 5. Dig. 48, 4, 2. Dig. 49, 16, 3, 4. Dig. 49, 16, 3, 10. Sallust, Catil. conspir.

Publius Scipio Africanus, too, although in other respects of a most lenient disposition, was bitter against deserters and fugitives; and, after the overthrow of Carthage, he ordered, for the better establishment of military discipline, that any Romans who, in contempt of authority, had deserted to the enemy, should be crucified and any Latins be beheaded: and Africanus the younger sent such deserters to the beasts. Paulus Æmilius, at the capture of Elephantis, and Marcus Marcellus at the capture of Leontini, beheaded about two thousand deserters. And we read that Metius Suffetius, when found guilty of treason, was drawn in pieces by four horses. And three hundred and seventy deserters to Hannibal, when recaptured by Quintus Fabius, were sent to Rome and all scourged in public and thrown from the rock. On another occasion, however, the same Fabius Maximus acted more leniently, for he ordered the amputation of the right hands of those who had deserted to the enemy in breach of their vow, so that the display of their mutilated arms should strike terror into the others and serve as a warning to others not to venture on the same crime. Indeed, among the Athenians it was a sacrilege to bury a traitor; he and all his issue were declared infamous and their corpses were ordered to be thrown over the boundaries of the State. To that

Livy, bk. 30. Val. Max., bk. 2, ch. 7. Val. Max., bk. 2, ch. 7. Livy, bk. 24. Livy, bk. 2. Livy, bk. 24. Val. Max., bk. 2, ch. 7. Plut., Lives of the ten orators. Plut., On God's slow-moving vengeance.

deserter, however, who has subsequently captured many of the enemy and has pointed out the deserters among them, clemency may be shown, according to a rescript of the Emperor Hadrian. Dig. 49, 1, 5 (end).

[2] He, too, is reckoned as a deserter to the enemy who, having an opportunity to return from captivity, has not done so; and, indeed, sol- Dig. 49, 1, 5, 5. diers whom the enemy has released are not reinstated unless it is clear that they were genuine captives, not deserters. Dig. 49, 1, 5, 6.

[3] Further, those who secretly carry intelligence to the enemy are reckoned traitors and visited with capital punishment, either burning Dig. 49, 1, 6, 4. Span. Ordin., bk. 2, tit. 28, par. 2 and bk. 24, tit. 21, par. 2. alive or hanging. Dig. 48, 19, 38, 1. It happened once at Carthage that one of the most powerful men of his day was found guilty of treason, his hatred of the general Hanno having led him to write in Greek to the tyrant Dionysius telling him of the approach of the army and of the slackness of the general: their Senate, in consequence, enacted that thenceforth no Carthaginian should learn either Greek literature or speech, so that there could not be any interpreter either for conversation or for correspondence. Dig. 48, 19, 8, 2. Justin, bk. 20.

[4] Again, not only do those who carry secret intelligence to the enemy merit punishment, but those also who spread it abroad among their own troops. Accordingly, the Egyptians had a provision in their military law whereby any one who published a general's plans was to lose his tongue. And the Persians of old, in their discipline, secured the safe- Diod. Sicul., bk. 2. keeping of the king's secrets by the penalty of death. And it is on Quint. Curt., bk. 4. record that no Senator for many centuries divulged the secret counsels of the Roman Senate. Accordingly, when Quintus Fabius Maximus told Publius Crassus about the secret proceedings of the Senate, with regard to a declaration of war against Carthage, he was vehemently upbraided by the consuls, although it was an act of inadvertence; for Fabius was aware that Crassus had held the quæstorship for the preceding three years and was unaware that the censors had not yet placed him in the ranks of the Senate. For, as Valerius Maximus says, they would never Bk. 2, ch. 2. allow the habit of silence to be impaired, it being one of the most valuable and surest safeguards of administration.

And so when the Asiatic sovereign, Eumenes, who was a great partisan of the Romans, intimated to the Roman Senate that Perseus was preparing to make war on the Roman people, it was not until after the capture of Perseus was known that any information could be obtained with regard to what Eumenes had told the Senate or the nature of their reply. It was, accordingly, a wise reply that Cæcilius Metellus gave to Val. Max., bk. 2, ch. 2. the military tribune who was interrogating him about his plans: "If I thought," said he, "that my tunic knew them I would take it off and throw it into the fire"; indicating thereby that the schemes of generals should not be disclosed.

Further, those must be added to the list of traitors who supply the enemy with weapons and arms. This is a capital offense and their prop-

Cod. 4, 41, 1. erty is sold up. And Paulus gave an opinion that material of war can
Dig. 48, 4, 4. Dig. 39, 4, 11. not be sold to the enemy without risk of capital punishment. They, indeed, who assisted the barbarians to plunder the Romans and divided
Cod. 12, 35, 9. the spoil with the enemy were burned alive.

[5] Further, enemy spies who may fall into our hands do not merit such bitter aversion as those who desert to the enemy or carry secret intelligence to him. This is evident at first sight, for their conduct is not stained with perfidy. And so when a certain Carthaginian spy who had escaped capture for two years was at last caught at Rome,
Livy, bk. 22. he only had his hands cut off and was then let go.

[6] It is often asked in this connection whether it befits a gentleman (*nobilis*) to be a spy and secretly find out what the enemy is planning and doing. And my opinion is that it would not be honorable for a gentleman to ply this business professedly and for hire, and that he could not do so without ignominy—as may be gathered from the full treatise of Tiraqueau on *nobilitas*—but if his motive in doing it was love of the State and the safety of the general public, I pronounce it not only not unworthy a gentleman, but eminently glorious. For the Lord commanded Moses, when he was journeying with the Israelites into the Land of Promise, to send men forward, one chosen from each of the tribes and every one a ruler, into the land of Canaan, to see the land, what it was and its size, and the people that dwelled therein, whether they were strong or weak, few or many, and what the land was, whether fat or lean, and the cities, whether they were strongholds or not, and
Numb., ch. 13. generally to spy out all they could. And Joshua sent two spies into the
Josh., ch. 2. city of Jericho before he besieged it.

And so, also, Sextus Tarquinius, feigning that his father was harsh and bitter towards him, fled to Gabii and was chosen by the men of that town to be their general, and, after winning a battle or two, was intrusted with the whole affairs of Gabii; whereupon he carried off the chief men of the State from its midst and delivered up the town, without
Livy, bk. 2. a blow struck, into the hands of his father, who was besieging it.

And when Zopyrus, a man of high rank and a friend of Darius, King of the Persians, saw that that King was weary of the long siege of Babylon and that the storming of the city would be very difficult, he had his nose and ears shorn off and fled to the Babylonians with his body mutilated, feigning that it was Darius who had thus foully treated him. The enemy believed him and received him kindly and gave him command of a body of horse and, after one or two successes in battle, made him at length commander-in-chief of their army; whereupon he deliv-
Justin, bk. 2. ered both city and army up to Darius.

Araspa, also, a Mede of very high rank and one of Cyrus' intimates, went over, on Cyrus' orders, to the King of Assyria as a deserter and, after spying out the enemy's forces and plans, returned to Cyrus and
Xenoph., Cyropaedia, bk. 6. was commended by him in the public assembly.

[7] These examples show us how very hazardous it is to trust to deserters; for even if they are fleeing to us without guile or fraud and are genuinely betraying their own side, not much reliance can be placed on them, for how can you hope that a man will be faithful to foreigners who has shown himself unfaithful to his native land? And so Antigonus used to say that he liked traitors during their treason, but that afterwards he found them utterly repulsive. That is the meaning of Augustus' saying, " I like treachery, but do not commend the traitor." Plut., Apoph.

And when some one complained to Philip of Macedon that the troops nicknamed him traitor because he had betrayed his country to Philip, that king made the witty reply, although he always chuckled at deceiving an enemy, " Don't be surprised: the Macedonians are very dull-witted: and rustic enough to call a spade a spade." By this reply Philip showed that traitors deserved obloquy from every one. And it was of a truth implanted in the Romans of old that they ought to gain their successes by what they themselves called Roman arts, i. e., by valor, toil and arms, rather than by the crooked conduct of others, as we have shown elsewhere. Above, ch. on Trickeries and deceit in war.

Chapter XIV.

Of the seditious.

1. Intestine seditions dangerous.
2. Severe measures to be taken against the seditious.
3. Sovereign authority not to be rashly asserted.
4. Luxury and license great breeders of sedition.
5. Wonderful skill in quieting sedition.
6. Standards of conduct different in peace and in war.
7. Sedition to be appeased before the ringleaders are punished.
8. How sedition may be repressed.

[1] How dangerous intestine dissensions are was neatly shown by the orator Menenius Agrippa, in the fable about the revolted limbs of the human body, which he addressed to the people who had seceded to the Sacred Mount. And Scillurus showed the same thing with his bundle of spears which he displayed to his eighty descendants for them to try to break. For it is sufficiently evident that not fewer armies have been ruined by their own strength through discord and sedition than have been overthrown by the enemy.

Livy, bk. 2.

[2] Accordingly, the very sternest measures are always taken against the seditious and the movers of sedition, as being guilty of treason. And so Modestinus ruled that a man who had stirred up a fierce sedition among the troops, should be capitally punished, but that if the disaffection did not go farther than bluster and mild complaints, the punishment should be degradation. And Paulus' view was that the seditious should be hanged or thrown to the beasts or deported to an island, according to their rank.

Dig. 48, 4, 1.
Dig. 49, 1, 3, end.

By the constitutions of the Kingdom of Spain, too, regard is to be had, in fixing punishment, to the quality of the offense and the rank of the offenders; and if the intent of their sedition was to neutralize an opportunity of striking some successful blow, they are to have their eyes plucked out and be cast into prison until the opportunity in question has gone by; while, if they are of the higher ranks, they are to be deemed prisoners and thereafter banished.

Dig. 48, 19, 38, 8.
Cod. 9, 30, 1 and 2.
Span. Ordin., bks. 4 and 5, tit. 28, par. 2.

And, although Cæsar would overlook other offenses, he always punished sedition with marked severity; and at a time of civil disturbance and great public excitement he discharged a whole legion for sedition, and had the movers of the sedition beheaded. Shortly afterwards, however, he yielded to the entreaties of those whom he had discharged to be freed from ignominy, and he reinstated them and they turned out most valuable soldiers.

And when the troops kept threatening Cnæus Pompey that they would seize the money which he was carrying in his triumphal return home, and Servilius and Glaucias begged him to divide it up, so as to prevent sedition, he declared that he would forego his triumph and would rather die than give way to the audacity of the troops; so he addressed a scathing speech to the men and had the belaurelled *fasces* pointed towards them, so that the plundering might begin with them, and by this haughty act he reduced the troops to decorum.

[3] Generals should, however, take heed not to venture on any rash assertion of their sovereign prerogative (the whole essential force of which resides in the consent of those who submit to it), where there is any chance that the soldiers will not obey orders. This was the prudent advice given by the legates to Appius Claudius when he proposed to take very severe measures against the soldiers for having, out of spite towards him, basely retreated to the camp after he had led them out to battle. Livy, bk. 2.

Further, the consul Gemitius discharged four thousand men and beheaded them in the forum because, with utter abandonment of all discipline, they had seized Rhegium which they were garrisoning, and he forbade the burial of their bodies and that any one should mourn for their death. Val. Max., bk. 2, ch. 7.

[4] Yet in the prevention and restraint of military sedition a commander must show great discretion. Livy, bk. 28. In the first place he ought to realize that ease and leisure breed luxury and license, and that these in their turn foster more than anything else the development of designs of this kind among the troops, as Livy has convincingly shown in his history, where he says: "Capua, even then by no means favorable to Bk. 7. military discipline, banished the remembrance of their country from the minds of the soldiers, which were debauched by the supply of pleasures of all kinds, and schemes were being formed in winter-quarters for taking away Capua from the Campanians by the same kind of wickedness as that by which they had taken it from its original possessors."

[5] Again, the skill displayed by the consul Caius Martius Rutilius, in foiling the conspiracy at Capua, is much to be praised. He was a man of ripe age and experience, and thought it the wisest proceeding to frustrate the violence of the soldiers by prolonging their hope of executing their project at whatever time they might choose; and so he spread the rumor that the troops were to pass the winter of the next year in the same towns. For they had been cantoned throughout the cities of Campania. The edge being thus taken off the eagerness of their projects, the mutiny was set at rest for the time being. And the consul, having led out his army to the summer campaign, determined, with admirable adroitness, whilst he had the Samnites quiet, to purge the army by discharging the turbulent characters, some on one pretext, some on another. Livy, bk. 7.

[6] Now, the time is not always a fitting one to make hazardous assertions of sovereign authority. For, as Tacitus says, what in times of peace is dealt with by disciplinary vengeance, is endured, for caution's sake, in times of sword and mob. And, as Fabius Maximus used to say, different counsels and different lines of conduct are followed in the full ardor of war and in the tranquillity of peace, as we have elsewhere

Above, bk. 2, ch. 5. shown. Hence, also, I think that when any serious sedition has arisen, all possible measures should be employed to appease it and that until that is done the movers ought not to be dealt with, for fear that otherwise the raging of the soldiery be rather irritated and kindled than soothed and extinguished.

That was the example which was set by Scipio at the time when a sedition broke out among his troops in his camp at Sucro in Spain. He sent seven military tribunes to them in order to calm the minds of the soldiers by their mild and soothing discourse, and then he drew them to Carthage by issuing a proclamation that they should come there to claim their pay. There he had the whole army surrounded, and after castigating the troops, who were numb with fear, in a powerful harangue, he had the leaders of the mutiny dragged into the midst of the assembly and bound naked to the stake and scourged and beheaded. There had been a divergence of opinion whether only the leaders of the mutiny should be visited with punishment or whether atonement should be exacted as for a defection rather than for a mutiny (it being of so dreadful a character as a precedent) by the punishment of a greater number. The more lenient view prevailed, that the punishment should fall where

Livy, bk. 28. the guilt had originated.

Annals, bk. 1. [8] To this must be added the remark of Tacitus that it is a very serviceable thing for the preservation of soldiers' fidelity, at a time when sedition is feared, to spread the army out with long intervening gaps, lest the soldiers increase both their strength and their faults by union. And, further, seeing that ease is the great breeder of military sedition, it is expedient to break in on it with a war, after the fashion of Alexander. And Cæsar adopted a shrewd method in the civil war of binding his army to himself. For, he borrowed money from the military tribunes and the centurions, and then distributed it among the troops; hereby he attained two objects, for he secured the loyalty of the centurions by the pledge that he had thus given and he bought the affection

Cæsar, Civil war, bk. 1. of the troops with a bribe.

That, again, is memorable which the histories tell us about Hannibal. For, although he conducted a war for thirteen years on hostile soil and far from home and with varying fortune, and although his army was not homogeneous and made up of his own fellow-citizens, but was a mongrel assortment of all nationalities, who had no community of law or custom or speech, and differed in bearing and dress and arms, in rites

and religion (*sacra*) and almost in gods, yet he so bound them together by one bond that no sedition ever broke out among them or against their general, even when, as was often the case, there was a shortage of money and pay and supplies in hostile territory. We read the same thing about Viriatus, who for eight whole years, during which he was warring with the Romans, kept an army, composed of all races of mankind, free from sedition and in a most tractable disposition—a thing which indeed was impossible without a certain admirable virtue in the general.

Livy, bk. 27

Appian, Span. war.

But Scipio, although in other respects a consummate commander, provided his men by his lenience with a handle for sedition, and Quintus Fabius Maximus used this to show that Scipio was born for the corruption of military discipline and that it was almost true to say that more was lost in Spain by the fault of Scipio through military sedition than in battle. So rooted in the natural disposition of some men is it to refuse to be offended rather than to pluck up sufficient courage to avenge offenses!

Chapter XV.

Of those who yield ground in battle, or surrender when beaten.

1. The general ought be more feared than the enemy.
2. He who begins a flight from battle, is capitally punished.
3. Severity conduces to success.
4. Those who surrender to the enemy have no right of postliminy.
5. He who simulates illness through fear of the enemy.

[1] The Lacedæmonian general Clearchus used to tell his army that they ought to fear their general more than they feared the enemy: he meant that those who shrank from a doubtful death in battle would find a sure punishment awaiting them if they deserted, his aim being that it should become an instinct with his soldiers either to conquer or die. And this necessity, indeed, is not infrequently turned into a virtue, as we have said elsewhere. (Above, bk. 2, ch. 11.)

[2] And so it is provided in military law that the first to begin a flight from battle is capitally punished. (Dig. 49, 16, 6, 3.) And there is a similar royal enactment in Spain with regard to a nobleman who flees. (Span. Ordin., last book, tit. 21, ch. 2.) By the canon law such a person is infamous; (c. 17, C. 6, qu. 1.) but the divine law requires that timid persons shall be ordered to return home, lest they infect others with their timidity. (Deut., ch. 20. Judith, ch. 7.) Appius Claudius, in the case of those who had yielded ground in the Volscian war, had one man drawn by lot out of every ten and executed. (Livy, bk. 3.) Antony did the same thing in the Parthian war. (Appian, Parthian war.)

In the consulship of Publius Cornelius Nasica and Decimus Junius those who had quitted the ranks were ordered to be flogged and then were publicly sold. And when Attilius Regulus was marching out of Samnium into Luceria, and the advance of his army was barred by the enemy, he stationed a cohort with orders to slay any fugitives just as if they were deserters. And the first thing that Camillus did after his appointment as dictator, during the war with Veii, was to punish by martial law those who had fled from Veii, panic-stricken, during the last-preceding battle; in this way he took away from his men any especial dread of the enemy. (Livy, bk. 5.) Titus Scaurus forbade his son to come into his sight, because of his retreat before the enemy in the Tridentine pass; and the shame of this ignominy so weighed on the young man that he committed suicide.

But Marcellus adopted a milder method with certain soldiers who had originated a retreat and had quitted the colors in panic; in the next

engagement he put them in the first rank, close-packed, so that by danger in other battles they might wipe out the ignominy they had incurred. Val. Max., bk. 2, ch. 7. The Roman Senate, however, by a stern decree reduced to a condition worse than death and banished into Sicily those who had abandoned their still-fighting comrades at Cannæ; and when Marcellus subsequently wrote for permission to employ their assistance in the storming of Syracuse, the Senate replied that they were unworthy to be received into the army and to have the State's interests intrusted to them, but that he might do what he judged expedient for the State, provided that none of them should have any privileges or receive any military reward or return to Italy so long as the enemy was in it. Livy, bk. 25.

And the same measures were taken with regard to those soldiers Val. Max., bk. 2, ch. 7. who had saved themselves when the prætor Cnæus Fulvius was so disgracefully beaten and put to flight in Apulia: and, over and above this ignominy, they were forbidden to spend the winter in a town or to build winter-quarters nearer than ten miles to any town; and Cnæus Fulvius was accused capitally and went into exile. When Scipio, however, went Livy, bk. 26. over into Africa, he did not spurn the survivors of the defeat at Cannæ, for he knew that that defeat was not due to their cowardice, but to the fault of their general, and that there were not in the Roman army any troops equally ripe and experienced, not only in various modes of fighting but also in storming towns.

[3] Further, many examples show us how greatly this severe discipline conduces to success. One such example is that of Licinius Crassus, Livy, bk. 29. when dealing with the gladiator Spartacus: this man was making war on the Romans with a large band of fugitives and men of his own condition and was flushed with a certain number of successes: so Licinius decimated his legions because of their poor behavior in the field and thus made them fear him more than they feared the enemy. Then he led his men anew into line of battle; and, although his army was much reduced in size by this decimation, he inflicted great slaughter on the enemy and won a decisive victory over Spartacus. In the same way, Appian, Civil war, bk. 1 (at end). when the troops of Lucius Apronius had been routed by Tacfarinas: Apronius, being more grieved at the disgrace of his own men than at the success of the enemy, did (says Tacitus) a thing which at that time was Annals, bk. 3. rare and a matter of ancient memory merely; i. e., he chose by lot one man out of every ten in the disgraced cohort and clubbed them to death; and this severity was so effectual that a company of veterans, not more than five hundred in number, routed the very same forces of Tacfarinas.

[4] The Romans, furthermore, reckoned it base and worthy of punishment not only to yield ground and flee, but also to fall by surrender into the hands of the enemy. And so Ulpian ruled that those who Dig. 49, 15, 19. surrender to the enemy with arms in their hands can not set up postliminy. And it is recorded that Titus Vespasianus maintained a discipline

so severe that he would not allow a certain soldier who, after capture by the enemy, had broken his chains and fled back to the camp, to continue in the service, and would not intrust arms to him because he had submitted to be taken alive by the enemy.

And when a large number of enslaved were voluntarily released and returned by Pyrrhus, the Senate, although the forces of the State were exceedingly reduced, decreed that those of them who had served in the horse should be joined to the foot and those who had been foot-soldiers should be enrolled in the auxiliary slingers and that none of them should come within the camp, or surround with a wall or a ditch the place assigned to them outside the camp, or have a tent made of skins; and he would only allow those to be reinstated in their former military condition who had won double spoils from the enemy.

Val. Max., bk. 2, ch. 7.

And the Senate displayed equal severity when Hannibal offered it the chance of ransoming eight thousand Romans who had surrendered to him when left in the camp after the defeat at Cannæ; for it spurned his terms and, in lieu of the captives, enlisted eight thousand slaves bought with the public funds. It preferred to have the latter as soldiers, although there was an opportunity of ransoming the captives at a lower cost, being mindful that so large a number of armed young men could not have been so disgracefully captured if they had been willing to die honorably. Now it was implanted in the Romans that they must either conquer or die. And it is recorded that when Hannibal heard of this incident, he was dismayed to find the Roman Senate and people of so lofty a soul in adversity.

Livy, bk. 22
Val. Max., bk. 2, ch. 7.
Cic., Offic., bk 3
Dig. 49, 1, 6, 5.

[5] Lastly, those also who feign sickness through fear of the enemy are ordered to be punished capitally. And Sallust relates a notable thing about the old Romans, namely: that in time of war they were more often accused of fighting with the enemy contrary to orders, because the recall came too late to prevent them going into battle, than of daring to quit the colors or to yield ground under compulsion.

Chapter XVI.

Of those who part with their arms or lose them.

1. To lose arms in war, or to part with them, a grave offense.
2. Arms are not reacquired by postliminy.
3. The loss of shield or sword in battle.

[1] The ancients regarded arms as the limbs of a soldier, and so it was reckoned a grave crime to lose or part with them during war, and it was capitally punished. That crime is, indeed, put on a par with desertion, whether it be the whole outfit that is parted with or only a portion thereof—there being, however, this difference: a man who loses or parts with his leggings or cape is thrashed, but if it be his cuirass or sword or shield he is like a deserter, save that some allowance is made for a recruit.

Dig. 49, 16, 3, 13.

Dig. 49, 16, 14.

[2] Hence it is that, as Marcellus ruled, arms are not reacquired by postliminy, because the loss of them is a disgrace. It is, accordingly, singular that by an ordinance of the Kingdom of Spain arms lost in war may be replaced out of any booty that may happen to be taken. The same constitution, however, brands nobles with infamy for this and deprives them of the prerogatives of their rank. And indeed the loss of arms in war has ever been held most disgraceful, and so when Marcus Cato, the son of the censor, was thrown during an engagement by a fall of his horse, and noticed, as he was gathering himself together again, that his sword had fallen out of its sheath, he so shrank from the ignominy thereof that he plunged into the thickest of the foe and after receiving several wounds recovered his sword and returned to his own men; and the enemy were so struck by this sight that on the following day they came as suppliants to beg for peace.

Dig. 49, 15. 2, end.

Span. Ordin., bks. 4 and 5, tit. 25, par. 2.

Span. Ordin., last bk., tit. 21, par. 2.

Val. Max., bk. 3, ch. 2.

The consul Lucius Calpurnius Piso, again, ordered his prefect of the horse, Caius Titius, who had surrendered to the enemy his arms and men when surrounded by a large number of fugitive slaves, to attend the parades in the general assembly (*principia*) during the whole time of his service, with the mantle of his toga torn in the lappets, with the girdle of his tunic undone, and with naked feet. And when Appius Claudius' force had been routed by the Volscians, he inveighed against it as a traitor to military discipline and a deserter of the colors, and demanded of the men one by one where the standards were and where their arms were, and he flogged and beheaded those soldiers who were without their arms and those standard-bearers who had lost their standards.

Justin, bk. 33.

Val. Max., bk. 2, ch. 7.

Livy, bk. 2.
Dion. Halic., bk. 9.

And the Lacedæmonians drove the poet Archilochus out of their city for writing a poem in which he seemed to suggest that the loss of arms was preferable to the loss of life. And the Spartan women used to bid their sons, when going out on a military expedition, either to return into their sight alive with their arms or with their arms to be brought back dead.

[3] Further, the Greeks had a military law that the soldier who lost his shield in battle should be punished capitally, but if it were his sword, he was to receive lighter punishment—the reason being that the generals of greatest reputation held it a more important point of discipline for a man to protect himself from the enemy and keep himself unhurt than for him to kill an enemy with hurt to himself. And that was the view of Scipio Æmilianus also, who said that he would rather save a fellow-citizen than undo many enemies. And so when Epaminondas lay dying, pierced by a spear, he asked first whether his shield was safe and then whether the enemy was utterly routed; and after he had obtained satisfying answers to both these questions, he died with heart at ease saying, "Now is your Epaminondas born, in that this is the manner of his death." Val. Max., bk. 3, ch. 2.

Chapter XVII.

Of those who desert, or neglect, their watch.

1. The duties of the watch to be diligently performed.
2. One who deserts the palace-watch to be capitally punished.
3. The punishment of those who sleep at their posts.
4. If prisoners intrusted to the ward of soldiers escape.

Not the least important part of military discipline is the proper posting of guards and close attention to the duties of the watch. We read how neglect in these particulars has led to the slaughter and overthrow of many armies, to the capture of many camps, and to the occupation of many cities. It was in this way, at a time when he was buried in slumber and wine, that the son of Queen Thomyris was attacked by Cyrus, and perished with his whole army. And after the loss of the Justin, bk. 1. Scipios in Spain, Lucius Marcius operated with the residue of the forces against two camps of the Carthaginians and, finding them in a complete state of disorder and neglect due to their victory, he captured them in one night with slaughter of the enemy. Livy, bk. 25.

[1, 2] Those, then, who fail in their duty on night-watch, when the rest of the force is sleeping in reliance on their diligence, deserve punishment. And so Paulus held that the punishment for desertion of the palace-watch, was capital; and Modestinus said that one who aban- Dig. 49, 16, 10. doned a post was worse than a truant (*emansor*) and that his punishment, according to the degree of guilt, was flogging or loss of rank, while one who quitted his watch over a commander (*præses*) or any other officer was liable to be treated as a deserter. When the Gauls had Dig. 49, 16: 3, 5 and 6. slipped through up to the summit of the capitol, owing to the neglect of the watch (though they were ultimately aroused by favor of the geese), Publius Sulpitius, the military tribune, proclaimed that he would proceed by martial law against the guard at that place, whom the enemy in their climb had eluded; but he was frightened by the unanimous clamor of the soldiers, who threw the blame upon one member of the watch, and he took no measures against the rest, but with universal approval hurled the undoubtedly guilty party from the rock. Livy, bk. 5.

[3] And when Epaminondas was going his round of the watches and posts, he made an example, in the interests of discipline, of a soldier whom he found asleep, for he plunged his sword through him, declaring that he had left him the same as he had found him. And Augustus Plut., Apoph. punished with death the men and officers of a company who had deserted

their post. Further, by the constitutions of the Kingdom of Spain, those who sleep at their posts are, after three warnings, thrown from the rock or the walls of the fortification where their watch happens to be placed. And Polybius tells us the principle upon which camp-watches were appointed among the Romans, and about the duty of those who went rounds of inspection of the watches, and what the punishment was of those who were negligent.

Span. Ordin., bk. 9, tit. 18, par. 2.

On Roman camps.

Now Paulus Æmilius adopted a novel method for securing that the watches should strive more intently against sleeping, and that was to forbid them to take their shields with them on watch-duty, for this duty was quite distinct from fighting and did not involve the use of arms, but only of vigilance; so that directly they perceived the approach of the enemy they should retreat and rouse the rest to arms. And once when the Thebans made holiday and were all given up to wine and feasting, Epaminondas went round the city on foot, alone, and meanly-clad and full of thought; and, upon one of his friends expressing surprise and asking the reason, he replied, "In order that you all may drink and take your ease." And in the same way, once when Cambyses, the father of Cyrus, was asked about the best means of guarding a city, he shrewdly replied, "By the guards never thinking that they have taken sufficient measures of precaution against the enemy."

Livy, bk. 44.

Plut., Apoph.

[4] Now it is usual to intrust the custody of prisoners to soldiers: and, if they escape, the soldier is, according to the degree of guilt, chastised or put to an inferior service; but careful inquiry must be made whether the escape was due to the culpable negligence of the soldier or to accident. The Emperor Hadrian gave a rescript to this effect.

Dig. 48, 3, 12, 1.

Dig. 48, 3, 12.

Chapter XVIII.

Of him who loses, or surrenders to the enemy, a fortress or town which he has been appointed to defend.

1. He who has failed to hold a fortress, guilty of treason.
2. In defense of a fortress, death not to be shunned.
3. Should the commander of a fortress be punished when it has been taken without any fault imputable to him?
4. In what circumstances a commander is not bound to defend a fortress.
5. The commander of an ill-equipped fortress.
6. A fortress can hardly be given up to the enemy without incurring ignominy.
7. Whether the erection of a fortress is more help or hindrance to a State.
8. Foreigners ought not to have easy entrance to a fortress.

If slaves have to answer with their head to their masters for the safe-keeping of the house, alike from foes within and foes without, how much more must they to whom the custody of a fortress or a town is intrusted, seeing that in the protection of the public safety none ought to shun any danger or torture, or death itself! The very highest standard of diligence must, therefore, be satisfied in the safe-keeping of a fortress. (Dig. 29, 5, 1, pr.) (By inference from Dig. 1, 15, 3, 3.)

[1] And so failure to hold a fortress, or the surrender of a camp to the enemy, is punishable under the *Lex Julia* about treason. The consul Lucius Rupilius, accordingly, in the campaign which he conducted against the deserters in Sicily, ordered his son-in-law, Quintus Fabius, to quit the province for losing the fortress of Tauromenium by his negligence. And Caius Cotta had his kinsman Publius Aurelius Pecuniola (whom he had put in charge of the siege of Lipara, when he himself was going to Messina in order to take the auspices) flogged and put to the military duties of a common foot-soldier for having by his fault allowed the battering-mound to be burnt and the camp to be all but taken. And when his battering-mound was burnt by the enemy, Marcus Antonius decimated two of the cohorts that had been engaged in that work, and punished the decurions individually, and dismissed the legate with ignominy, and had the rest of the legion given rations of barley. (Dig. 48, 4, 3.) (Val. Max., bk. 2, ch. 7.) (Val. Max., bk. 2, ch. 7.) (Appian, Parthian war.)

Titus Turpilius Syllanus, the prefect of the town of Vacca, was called on by Metellus to explain why one of his soldiers had escaped when all the soldiers of the garrison were cut down by fraud, and because he could not clear himself he was condemned and flogged and punished capitally. The dictator Quintus Cincinnatus, after conquering the Æquians and sending them under the yoke, made Lucius Minutius, whom he had relieved when besieged by the enemy, resign the consul- (Sallust, Jugurthine war.)

ship, distributing the booty of all kinds among his own troops only; for he held that man unworthy of exalted command who owed his safety not to his own valor, but to a ditch and a wall, and who had not been ashamed to allow the arms of Rome to be confined within closed doors
Livy, bk. 3. by timid apprehensiveness.

Further, Alexander of Macedon punished with a fine a certain commandant of a fort for deserting his post; and after the Mamertines had accepted a Roman garrison and the Carthaginian garrison had been driven out by fighting, the Carthaginians crucified the commander of
Polyb., Hist., bk. 1. their garrison for his timidity and cowardice in losing that fortress. And that was an exceedingly fine remark of Alexander's which he made on hearing that Aornus, a rock in India, was naturally impregnable, but was held by a timorous man: "He makes," said Alexander, "the place
Plut., Apoph. quite easy of capture." And a certain Lacedæmonian noble made a fine reply when Philip threatened to decree (*prohibiturum*) punishment on him if the city was not handed over to him: "And will you decree (*prohibere*), too, that I am not to die for my country?"

And the reply made by Lucius Pinarius, who commanded the garrison in the fortress at Ænna in Sicily, was brave and wise. The leading men of Ænna had arranged with Himilco for betrayal of the garrison, but no opportunity for the treachery presented itself, so they publicly put it about that the town and fortress ought to be under their control and urged that the keys of the gates should be handed to them, because (said they) it was as freemen going into partnership that they had been given to the Romans and not as slaves going into custody. Then Pinarius made the reply that he had been placed in the command of the garrison by his general, and had received from him the keys of the gates and the ward of the fortress, which depended not on his discretion nor on that of the citizens of Ænna, but on the discretion of him who created the trust; that it was a capital offense among the Romans to quit one's post and that parents had sanctioned that law by the death even of their own children; that the consul Marcellus was not far off, and so they could send ambassadors to him who possessed the right and liberty of deciding. But the men of Ænna said they certainly would not send to him and solemnly declared that, as they could not obtain their object by argument, they would seek some means of asserting their liberty. Pinarius, upon this, asked that they would at least grant him an assembly of the people, so that it might be known whether the denunciations came from a few or from the whole State. And by their consent an assembly of the people was proclaimed for the next day. There all with one accord required him to surrender the keys, and when he lingered and put the matter off they passed on to fierce threats; whereon, as he could avail nothing, the prefect gave the soldiery the agreed-on signal with his gown and they rushed on the people of Ænna and put them, pitiably,

to the sword. By this act Ænna was retained. Marcellus did not reprobate it, but granted the spoil of the town to the soldiers, concluding that the Sicilians, deterred by this example, would refrain from betraying their garrisons. Livy, bk. 24.

[2] And what has just been narrated agrees with the royal enactments of the Kingdom of Spain, whereby it is provided that no form of death should be shunned in the defense of a fortress, the safety of which calls for firm action from every one, even against a father or a son or a former master, and that no one ought to put death or any form of danger, which are but transitory, on the same plane as infamy, which brands a man who has paltered with his honor, him and his posterity forever. And indeed if the needs of hunger prove so imperious, a man ought rather to eat his son than surrender a fortress to the enemy without his lord's orders. And it is no ground of excuse for the surrender of a fortress that the enemy threaten death to his wife or children or any other persons; for the safety of the State ought to be preferred to love of children. And so Alfonso Perez Guzman, after Tarifa had been besieged for a fortnight and the enemy, being foiled in all their attempts were threatening to kill his son who was in their hands, made answer that he had begotten his son for the service of his country, and no immortal one either, and that he would rather be bereaved of him, should fate so decree, than quit his post or break his faith, for the one thing might happen even with glory to him, while the other thing could not happen without disgrace and crime; and so he allowed his son to be nefariously slain by the enemy before his eyes. And indeed the Spaniards were such severe censors of this kind of discipline that by one of their constitutions a commander of a fortress was none the less guilty of treason if the surrender of the fortress to the enemy was made by a deputy whom he had for good reason put in his place.

Span. Ordin., bk. 12, tit. 18, par. 2.
Span. Ordin., bk. 7, tit. 17, par. 2 and Cod. 4, 43, 1 and 2.
Span. Ordin., bks. 6 and 12, tit. 18, par 2, and bk. 2, tit. 2, par. 7.
Dig. 49, 15, 19, 7.
Span. Ordin., bks. 1 and 6, tit. 28, par. 2.

[3] Further, seeing that it is inconsistent with justice to punish a man without fault and that a man who is free from fault ought to be free from punishment too, equity requires that if absolutely no fault or negligence can be imputed to the commander of a fortress which has chanced to be captured by, or surrendered to, the enemy, the commander ought to be exempt from punishment. And that this was considered reasonable by those of olden time is shown by the dispute relative to Marcus Livius, the commander of the fortress of Tarentum. Some blamed the commander, alleging that Tarentum had been surrendered to the enemy through his laxity; others commended him for having kept the fortress safe for five years and above all for having recaptured Tarentum by his own sole exploit; while a middle party declared that the decision rested with the censors and not with the Senate.

Cod. 9, 47, 22 and c. 23, Reg. jur. in vi.
Dig. 48, 3, 12.
Livy, bk. 27.

And when Lucius Attilius, commander of the garrison at Locris, suffered himself and the Roman soldiers with him to be conveyed to

Rhegium, in order to snatch them from the enemy's cruelty and preserve them for the State, because he saw that he could not prevent the citizens from surrendering their town to the Carthaginians, this was not imputed to him as a fault. Accordingly, if a man under compulsion of necessity (which, as Livy somewhere says, not even the gods can overcome) and in the utter absence of human aid, surrenders a fortress to the enemy, I hold that he does not deserve punishment; for to do one's best is to do all the law requires, and a vassal only owes fealty to his suzerain within the limits of what is possible, there being no legal obligation to perform the impossible.

Livy, bk. 24.

Feudal Laws, bk. 1, tit. 1, last ch., and thereon Alvar. and other glossators, and Baldus on beginning of said tit.

Hence Egnazio tells us that those who were driven by necessity to surrender the fortress of Scutari to the Turks who were besieging it, received no upbraidings on their return to Venice; for the Senate knew what the force of necessity is and that no valor can stand up against it.

De exempl. illustr. vir., bk. 7, ch. 6.

[4] Hence it is a common doctrine that an ungarrisoned city is quit of the charge of treason should it be surrendered to the enemy, especially if no relief is sent, and that a commander of a fortress is not bound to defend it if the King fails to supply the things that are necessary for its defense. It is on this ground that a vassal is not bound to do his services to his lord, or to recognize him, if he abandons the vassal in time of need, and Charles Dumoulin records that the ancient kings of Gaul allowed towns which they could not defend to surrender to the enemy.

Matth. de Afflic. on the royal constitution which begins, Dubitationem.

Joan. Imol., cons. 34. Decius, cons. 600, nu. 13. Panorm. cons. 3, nu. 5, bk. 1.

Heiron. Grat., cons. 5 and 51, bk 1.

Feudal Laws, bk. ii, tit. 26, c. 1, qual. dom. etiam propr. and thereon Alvar. and others on c. 1, § Domino committente, and thereon Baldus and others.

In addit., Dec. cons., 604.

I hold, accordingly, that if a fortress should be ill-equipped and its commander be without any human aid or hope of relief and can not withstand the force of the enemy, he may provide for the safety of himself and his men by bargain or in any other way and may abandon the fortress, especially when every expedient has been resorted to in vain and it is clear that the fortress would have fallen into the power of the enemy in any case; for there is no obligation to await that which would do no good if it did happen. That is why a man who is remiss (*in mora*) in performing his contract to deliver some specific thing is not liable on a destruction of the thing in question which would have happened just the same if the thing had been in the hands of the other party. A commander of a fortress, accordingly, is not bound to offer himself and his garrison to absolutely certain death, to the hurt rather than to the profit of the State.

[l. stipulatio, § divus. Dig. (?).]

Dig. 16. 3. 14; and 5, 3. 40; and 12. 1. 5 and the commentators thereon.

And so Callicratides, the Spartan general, incurred well-merited blame for preferring to risk his fleet rather than his own reputation; and so, too, did Cleombrotus, who, through fear of falling into disfavor, rashly engaged with Epaminondas and ruined the force of Sparta. For a great man, as Quintus Curtius says, ought rather to scorn death than hate life, and Cicero teaches that we ought to die for our country whenever our death will benefit it. We must accordingly do what is best for

Cic., Offic., bk. 1.

Offic., bk. 1.

our State and country in all possible ways, whether by surrender or by death, should the occasion arise; for a brave man must consider in all his acts the interests of his country and not his own, as we have shown elsewhere. Above, bk. 2, ch. 1.

[5] Add to the foregoing that by the constitutions of the Kingdom of Spain, which in other respects are not wanting in severity, he who has been intrusted by the King with the command of a fortress which is so badly built and ill-equipped that it can not be defended, and who has represented this to the King, is not guilty of treason, should the enemy gain the fortress by force and without the commander's fault. And, Span. Ordin., bks. 4 and 6, tit. 18, par. 2. on this principle, under a rule contained in the same constitutions, when a commander of a fortress is unwilling to undertake its defense himself, he is allowed to abandon it, after furnishing reasons why the defense is impossible, and this, too, without waiting for the enemy's attack, if the King should not have despatched a successor. But, for this to be so, no Span. Ordin., bk. 20, tit. 18, par. 2. one ought to undertake the command of a fortress or town save with much deliberation; and he ought so to arrange that if any reverse occurs and he is absolutely driven to surrender, this may not seem to be due to the fear of death so much as to the wish to preserve himself and his men for the service of the State and at all events to snatch a portion of the State's defenses out of a fortress which was about to belong entirely to the enemy.

[6] Although, however, the commander may be but discharging the duty of an intrepid man, it is barely possible for him to surrender his fortress without ignominy. For if, as we have shown above, the Above, bk. 3, ch. 15. ancients held it a disgrace for a single soldier to fall into the enemy's hands, what shall we say in the case of a commander who has been commissioned to defend the fortress and has bound himself by an oath so to do? Nevertheless, as we have said elsewhere, he must incur even this Above, bk. 2, ch. 1. ignominy, if it serve the interests of the State, rather than desert and betray his country by a futile defense and the dedication of himself and his men to death. Now the functions of a commander are one thing, those of a soldier another. The latter has to fight with bravery and the former to safeguard the interests of the State.

[7] Further, there was once no small discussion among writers on politics, whether the erection of fortresses did more good or harm to the State; and, although it was a prevalent view that a fortress was a useless and hazardous thing in the ideal State, still Rome was recovered, after its capture by the Gauls, by the garrison of the capitol; and the town of Ænna, mentioned above, was saved by means of its fortress and garrison.

[8] I hold, then, that there are many cases in which the erection of a fortress is expedient or even necessary, alike for withstanding an enemy's attack and for the preservation of the citizens in time of peace. For the rest, I would have commanders of fortresses enjoined to be chary

in allowing foreigners, especially men of strength and leading, access into the fortress, and to be mindful of the advice given by Pyrrhus, King of Epirus. For, when visiting Athens, Pyrrhus was shown over the citadel of Pallas, which was highly fortified by nature and art, and he viewed it with great appreciation and then he urged the prominent citizens who were in attendance on him never in the future to allow any king facilities for entering that citadel, for fear that some one might seize the opportunity of introducing an escort and might attack it; and this advice commended itself to the Athenians.

Chapter XIX.

Of theft and certain other military offenses.

1. Punishment of soldiers caught thieving.
2. The nature of the oath which tribunes usually exact.
3. It is against the regulations to go out of trumpet-range.
4. A capital offense to strike a comrade with a sword.
5. A serious offense for a disqualified person to enlist.
6. The punishment of a non-soldier who poses as a soldier.
7. The punishment of a non-citizen who poses as a citizen.

[1] The sole reason, according to Plato in his *Republic,* why man, in the fiction of the poets, was changed into a wolf is that those who have given themselves up to plunder and theft seem to have simply put off the man and the qualities of manhood and to be now men in name only and not in reality; they must, accordingly, be repressed by severe punishments. And, although the civil law does not impose corporal punishment on civilians for theft, yet commanders, for the better establishing of military discipline, generally impose somewhat severe penalties on soldiers taken in theft. And so Tiberius had a soldier of the prætorian guard executed for stealing a peacock out of his grounds. Aufidius Cassius crucified soldiers who offered violence or caused loss to provincials, and there are numerous examples recorded of ancient commanders doing the same thing. But the jurisconsult Paulus ruled that a soldier found thieving in the baths ought to be discharged with ignominy.

Suetonius on Tiberius.

Dig. 47, 17, 3.

[2, 3] Now it is usual for tribunes, on pitching a camp, to exact from all in it, whether free or slave, an oath that they will not steal anything from the camp and that, if they find anything, they will bring it to the tribunes. The formula of this oath is given by Gellius. And, for preventing the troops from looting, they are not allowed to go out of trumpet-range, except by the orders of the general or tribune, or to go outside the fortifications or quit the ranks. We have dealt with this elsewhere.

Polyb. on Roman Camps.
Bk. 16, ch. 1.

Above, bk. 3, ch. 11.

[4] Marcus Cato held that those found thieving from their comrades should lose their right hands. Modestinus ruled that one who surreptitiously took another soldier's arms should be degraded from the service. And in olden days great pains were taken to develop the idea of affectionate comradeship as the most effectual link between soldier and soldier, and as a kind of indissoluble bond. Hence it was a capital offense to strike a comrade with a sword, and one who even wounded another with a stone had to leave the service. Again, a soldier so careless

Dig. 49, 16, 3, 14.

Dig. 49, 16, 6, 6.

of his honor as to compound for a money-payment with the avowterer
Dig. 48, 5, 12. of his wife is discharged from his oath and deported.

[5, 6, 7] It is also reckoned a serious offense for a disqualified person to enlist, and it becomes more heinous, as in the case of other offenses,
Dig. 49, 16, 2. the higher the dignity, rank, and distinction in the service. The penalty
Dig. 48, 10, 27, 2. of fraud attaches, too, to a non-soldier who poses as a soldier; and similar in character is the law introduced by the consuls Crassus and Scævola
Cic., Offic. bk. 3. forbidding a non-citizen to pose as a citizen—such a person was said to
Sueton. on Claudius. be accused of peregrinity. Now the penalty for fraud is deportation
Dig. 48, 10, 1. and public sale of property.

Chapter XX.

Of soldiers' rewards.

1. The bestowal of punishments and rewards the best means of governing a State.
2. Soldiers to be incited by the offer of rewards.
3. Many rewards open to the soldier.
4. *Spolia opima,* what they were.
5. When a triumph may be decreed.
6. How long the Romans kept up the custom of the triumph.
7. Roman generals took names from the provinces and towns which they had subdued.
8. Military gifts were of divers sorts.
9. Military crowns, what they were.
10. A reward having been offered to the first to scale a wall, several scale it at the same time.
11. The rewards owed to dead parents given to their children.

[1] There is no better method of governing a State than the bestowal of punishments and rewards: this is approved by numerous opinions of philosophers. Thus Solon, one of the seven wise men and the only legislator among them, said that the stability of a State depends on it. And Democritus held that there were just two gods, Punishment and Reward. And when Lysander was asked what form of State he most favored, he replied, "That in which the brave and the cowardly get their respective deserts." When Theophrastus was asked what was the best protection of human life, he said, "Rewards and punishments." And Cicero asserts that neither a household nor a State can stand without any rewards for good deeds and punishments for bad ones. And no one, the same writer says, incurs dangers on the State's behalf in a laudable and valorous way, but his motive is the hope of reward from posterity. And where, said Thucydides, the greatest rewards of good conduct are offered, there the best men govern; for when good conduct receives the richest rewards, all strive for them with the best intent towards the State. Plut., Apoph. Nature of the gods, bk. 3. Speech for Rabirius.

Pliny wrote, addressing Trajan, "The rewards of goodness and badness make the good and the bad; and the pleasure always felt by the deserving at being rewarded, reacts on others like them as much as on themselves." And labor, says Livy, will be bestowed and danger run in a quarter whence emolument and honor may be hoped for, and there is nothing that men will not undertake if rewards be offered proportionate to the arduous nature of the task, and high honors breed high courage. And so Socrates said that that was the best State in which there were the greatest inducements to virtue. Hence Demosthenes spoke as follows: Panegyrica. Bk. 4. Against Leptines.

"Men of Athens, you ought to devote great zeal and attention to secure that all your laws shall be of the most excellent character and that this shall especially be the case with those which can increase or impair

the prosperity of the city. Now which are these? Those, of a truth, which confer honor on those who have deserved well and those which repress the bad with punishment; for if every one were deterred from every kind of wrong-doing by the fear of those evils which are the sanction of law, and if every one were incited to a zealous discharge of duty by the rewards attached to good acts, what could prevent the city from attaining the amplest prosperity?"

[2] Accordingly, just as military discipline needs sharpness in its punishments, so also there should be rewards to incite soldiers to valor. And herein a mistake is commonly made, in that (as Tacitus said) it is easier to requite an injury than a kindness, for gratitude is reckoned a burden and revenge a gain and many States are ruined, as Euripides says in his *Hecuba,* by the good and strenuous man receiving no greater reward than the slothful. Now Cyrus held in the highest esteem those who excelled in the military virtues, bestowing many honors on them.

[3, 4] Among the Romans, too, there were numerous prizes for valor open to soldiers and we will here cursorily review them. In the first place, then, if generals and kings, who had the chief guidance of affairs, had, when fighting in person, stripped the opposing general of his arms (then called *spolia opima,* or spoils of honor), they were allowed by way of reward to carry those *spolia opima* into the capitol and offer them to Jupiter Feretrius. It is believed that this offering was only thrice made by Roman generals, these being men who had toiled valorously and strenuously on behalf of the State. Romulus, the founder and father of the City, is said to have carried off the first *spolia opima;* this was from Acron, King of the Cæninenses, after the rape of the Sabine women; and on this occasion Romulus dedicated the temple of Jupiter
Livy, bk. 1. Feretrius. Not very long afterwards, Cornelius Cossus, a renowned general of that day, carried off the second *spolia opima* from Lars To-
Livy, bk. 4. lumnius, King of Veii, whom he overthrew in battle and killed. The doughty Claudius Marcellus, a good commander, carried off the third
Val. Max., bk. 3, ch. 2. from Viridomarus, a Gallic chieftain, whom he conquered near the Po.

[5] In addition, commanders-in-chief were accorded triumphs for success in war, and this was the greatest prize of victory. Not every victory entitled to a triumph, but only when the character of the war and the victory seemed to justify that distinction; for it was provided by law that no one should celebrate a triumph unless he had slain five thousand of the enemy in one battle and had routed great forces in a pitched battle, and punishment awaited that general who made a false return to the Senate of the number of the enemy killed in a battle or of the number of citizens lost in it; for a triumph was not allowed to a man who had won an over-sanguinary battle with great loss, that being a sad and meager gain, bringing to the State many funerals and little advantage. It was also enacted that a triumph should not be decreed except for an enlarge-

ment of dominion and not for regaining what had been previously lost in the war. And a further condition was that the general should have overthrown and conquered the enemy under his own leadership and management, and in his own and not another's province, and in such a way as to pacify it and leave no trace of war behind him.

Again, if the war was against privates or slaves or fugitives, or any other class of men unworthy of the Roman name, it was exactly as if the cause of the war was a shameful one; and, despite the victory that was won and the rout and overthrow of the enemy, no triumph could be celebrated. Further, even though the enemy had been defeated and put to flight, and exploits worthy of a triumph had been performed, it was considered impious to celebrate a triumph if neither consul nor prætor had commanded the army and the conquest and scattering of the enemy had not been achieved under the leadership and command of the proper magistrate. And if there had been two commanders, both magistrates, a triumph was granted only to the one of higher rank, lest the glory of the triumph should put the lower and the higher authority on an equal footing and the auspices which pertained to the higher magistracy should be brought into confused relations with the lower; a consul, accordingly, did not triumph side by side with a dictator or a prætor. But some of the cases where a Roman general was not allowed to celebrate a triumph were cases for a lesser triumph, or ovation.

Further, it was immaterial what glorious exploits and distinguished services had been performed or rendered to the State in a civil war, the commander derived no name therefrom, nor were any public thanksgivings decreed, nor any entrance into the city with ovation or triumph; because, however necessary victories of that kind might be, they were always deemed lamentable, as being won at the expense of home blood, not foreign. It is also clear that a Roman citizen when conquered in war could not be led in triumph, no matter how harmful and hostile he had been to the State.

[6] Now the custom of celebrating a triumph over conquered nations who had been beaten in war survived at Rome up to the time of the Emperor Probus, who is said to have been the last of the Cæsars to celebrate a triumph. Many details about the law of triumphs and about the apparatus and ceremony of a Roman triumph may be found in Vale-
Bk. 2, ch. 8. rius Maximus and Alexander ab Alexandro. Genial. dies, bk. 1, ch. 2 and bk. 6, chs. 6 and 17.

[7] Roman generals were also wont to derive a surname by way of honor, from the towns and provinces which they had subdued by force. Thus, of the three Metelli, one took the cognomen Numidicus, from his conquest of Numidia; another Macedonicus from Macedonia, and the third Creticus from Crete; and there was also a Metellus Balearicus, so called because of his victory over the Baleares. And Martius Coriolanus was so called from the Volscian town of Corioli; and the two

Scipios, the elder and the younger, both took the surname Africanus from Africa; and another Scipio took that of Asiaticus from Asia. In the same way with a large number of others, whose examples the Cæsars subsequently followed, bearing illustrious surnames derived from races and nations whom they had overthrown in war, to their immortal glory: and they often took surnames under a popular decree and occasionally by an acclamation of the Senate—whence the diverse titles of Arabicus, Adiabenicus, Parthicus, Armenicus, Germanicus, Sarmaticus, and Africus.

Alex. ab. Alex., Genial. dies, bk. 2, ch. 11.

[8] Moreover, there were diverse kinds of military gifts which in earlier times were given by generals to soldiers for valor in the field: and among the other prizes of the military profession the following were held specially honorable. There was the gift of the land won by their blood and sweat made to time-expired soldiers after the toils they had undergone; this they received as a most welcome return for labors and dangers, a sort of first-rate booty. Again, for the greater incitement of their courage towards the glories of military service by bringing their valor into greater honor and publicity, there was invented the reward of military crowns and other very signal tokens of honor, such as golden chains and double rations; and sometimes generals granted furlough or double pay as a reward of valor.

As appears from Dig. 6, 1, 15, 2 and 41, 1, 16.

And there were several cases where persons who had rendered distinguished services in war and who had found their private concerns in an embarrassed and ruinous condition received gifts and gratuities. Thus we read that Lucius Sicinius Dentatus, a man of distinguished parts and performance, was presented, for his military exploits, in addition to eight golden crowns and fourteen civic wreaths and three mural wreaths and one obsidional wreath, with one hundred and eighty-three neck-chains, one hundred and forty armlets, eighteen unstained spears, and twenty-five medals. Manlius Torquatus was not far short of this: for he brought back the arms of about thirty slain enemies and received about forty rewards from generals, including two noble mural wreaths and eight civic wreaths. No one, however, who had performed any exploit went away unrewarded with military gifts, in proportion to his merits and valor.

Val. Max., bk. 3, ch. 2.

Livy, bk. 6.

[9] There were, it may be added, many varieties of military wreath: the triumphal, the ovational, the obsidional, the civic, the mural, the naval, the castrensic—wherewith generals and others were presented for raising the siege of a town or camp or army, or for saving the life of a fellow-citizen, or for being the first to scale an enemy's walls.

Gell., Noct. Attic., bk. 5, ch. 6.

[10] Now, suppose a reward is offered to the first to scale an enemy's wall, and two or more scale it at the same moment, it is often discussed whether the reward be due to all or to none: and the prevalent opinion is that it is due to none, for each bars the way of the other and

Dig. 34, 5, 10.

Dig. 28, 5, 44. is a hindrance to him; and where all are equal there can not be a victory. Dig. 45, 2, 13.
Now, this is sound if the general has clearly meant to give the reward to one only, as if the offered reward was such and such a horse, for this kind of offer does not admit of multiplication; but otherwise I think the prize is due to all. For, as Africanus held, "first" does not only mean being in front of everybody, but not having anybody in front of you. And Paulus says, "*proximus*" means one with no one in front of him. The same holds good where there is a doubt who was the first to scale the wall. By inference from Dig. 28, 5, 44. Dig. 28, 6, 34. Dig. 50, 16, 92. By inference from Dig. 34, 5, 9 pr. and 10 (1).

And Scipio followed that opinion after the capture of Nova Carthago, for at that time a great strife, almost amounting to sedition, occurred between Quintus Tiberilius, a centurion of the fourth legion, and Sextus Digitius, a naval auxiliary, each one insisting that he was the first to scale the wall and that the honor of the mural wreath belonged to him; so Scipio ordered a general assembly and declared himself satisfied that Quintus Tiberilius and Sextus Digitius were absolutely equal in scaling the wall and that he would give both a mural wreath for valor. Livy, bk. 26.

But Augustus was readier to give medals, neck-chains, and other gold ornaments as rewards than mural, or camp, or civic wreaths.

[11] The constitutions of Spain, also, provide numerous rewards for bravery in the field and declare these rewards to be due to the children if the parents who won them be dead; and this was ruled long ago by Pisistratus. And at Athens a law of Solon enacted that, over and above these gifts granted to soldiers by generals, the children of those who perished in war should be nurtured and well educated at the public cost. And Constantine declared that the sons should be summoned to the military profession of their father. Span. Ordin., bk. 5, tit. 27, par. 2. Cod. 12, 47: 1 and 2.

INDEX OF CITATIONS.

(The numbers indicate pages of the translation. This index will also serve as a key to the meaning of the abbreviations in the marginal notes.)

* The translator estimates that there are 70 citations of the Bible and Apocrypha.

*The translator estimates that there are 206 direct citations of the Canon Law.

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*The translator estimates that there are 704 direct citations of the Digest, 228 of the Code and 15 of the Novels and Authenticae.

† The translator estimates that there are about 140 citations of Livy.

*The translator estimates that there are 31 citations of this authority.